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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 352

V. LOEWERS GAMBRINUS BREWERY COMPANY, PETITIONER,

vs.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 14, 1930

CERTIORARI GRANTED OCTOBER 20, 1930

(35,274)

(35,274)

SUPREME COURT OF THE UNITED STATES

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[fols. a & 1] **IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT**

V. Loewers Gambrinus Brewery Co., Plaintiff-Appellee,

against

Charles W. Anderson, Individually and as Collector of Internal Revenue for the United States, Defendant-Appellant

Statement under Rule 13

The above named plaintiff, V. Loewers Gambrinus Brewery Co., commenced this action by serving a summons and complaint on the above named defendant, Charles W. Anderson, on February 9, 1925, said summons and complaint having been filed on March 13, 1925. There has been no change in parties.

On the 9th day of March, 1925, the defendant served a notice of appearance and an answer to the complaint which were filed on March 10, 1925. On the 9th day of May, 1925, the plaintiff served on the defendant an amended complaint which was filed on the 11th day of May, 1925. On the same day a stipulation was entered into between the parties thereto that the answer to the original complaint may stand as the answer to the amended complaint.

On the 26th day of October, 1927, plaintiff herein served an amended and supplemental complaint on the defendant. [fol. 2] On the 1st day of December, 1927, defendant served an answer to the said supplemental and amended complaint which was filed on December 2, 1927. Issues were joined and the trial was had on the 27th and 28th of November 1928, before Hon. Frank J. Coleman, Judge of the United States District Court without a jury, a stipulation waiving a jury having been filed. Findings of fact and conclusions of law were filed on April 8, 1929, and defendant's proposed findings of fact and conclusions of law filed on April 10, 1929. On April 11, 1929, defendant filed exceptions to the Court's findings of fact and conclusions of law. Judgment was entered on the 10th day of April, 1929, in favor of the plaintiff. On the 20th day of June, 1929, this appeal was taken.

[fol. 3] Summons, in usual form, omitted in printing.

[fol. 4] In United States District Court for the Southern District of New York

V. Loewers Gambrinus Brewery Co., Plaintiff,

against

Charles W. Anderson, Individually and as Collector of Internal Revenue of the United States of America, Defendant

Amended and Supplemental Complaint

The plaintiff, by Paskus, Gordon & Hyman, its attorneys, for its amended and supplemental complaint, respectfully shows to the Court and alleges:

For a First Cause of Action

First. That at all the times herein mentioned, plaintiff was and still is a corporation organized under the laws of the State of New York, and having its principal place of business in the City of New York.

Second. That the defendant was at all such times and still is Collector of Internal Revenue of the United States of America in the Third District of New York.

Third. That said plaintiff was, prior to and during the years 1918 and 1919 engaged in the manufacture and sale of malt liquors generally known and described as beers, [fol. 5] ales and porter, and had been so engaged for a period of forty years. That during that time, it had built up a substantial and lucrative business in said commodities and had invested large sums of money in buildings, plants and equipment for that purpose and in establishing good will.

Fourth. That in accordance with the provisions of the Statute of the United States in such cases made and provided, plaintiff herein duly prepared and on or about the 5th day of June, 1919, duly filed its return with the Collec-

tor of Internal Revenue for the calendar year 1918 showing its net income subject to tax and duly paid the tax thereon shown to be due.

Fifth. That thereafter, the Commissioner of Internal Revenue caused an examination to be made of the books of the taxpayer for the calendar years 1917, 1918, 1919 and 1920 and thereupon in accordance with the provisions of the Revenue Act of 1921, did on the 11th day of January, 1923, address to the taxpayer a letter proposing additional assessments as follows:

1918	$34,352.16
1919	25,532.29

Sixth: That in accordance with said statutes and the rules and regulations adopted by the Treasury Department of the United States, pursuant thereto, plaintiff duly appealed to the Commissioner of Internal Revenue alleging various exceptions to the proposed assessment of additional tax among them being a claim that it was entitled to a reasonable allowance for obsolescence of buildings and [fol. 6] good will as a result of the adoption of the Eighteenth Amendment and the Acts of Congress passed pursuant thereto prohibiting the manufacture and sale of intoxicating beverages and the said taxpayer claimed that with a proper allowance of its claims, it would not be subject to additional taxes for the years in question, but on the contrary, would be entitled to receive a refund of all the taxes already paid by it.

Seventh. That such proceedings were duly had before the Commissioner of Internal Revenue that the claims of the taxpayer were allowed except those for obsolescence of buildings and good will.

Eighth. Thereafter over the protest of the plaintiff said Commissioner of Internal Revenue directed the defendant as Collector of Internal Revenue to assess additional income and profits taxes against the said plaintiff for the year 1918 in the sum of $6,847.43. Said defendant, Collector of Internal Revenue, did assess said sum as additional income and profits taxes against the plaintiff for the calendar year 1918 and applied in payment thereof, certain over-

payments made by the plaintiff of taxes for the years 1913 1914, 1915, 1916, 1917 and 1920 in the sum of $2720.58, as allowed by certificates of over-assessments issued by the Commissioner of Internal Revenue, leaving as an unpaid balance of said additional assessment, the sum of $4,126.85. The said defendant thereupon served a notice and demand for the payment of said sum of $4,126.85 and threatened to impose additional penalties provided by law for failure to [fol. 7] make payment within ten days as specified in said notice.

Ninth. Thereupon on the 11th day of June, 1924, and more than five years after the filing of plaintiff's return for the calendar year 1918, the plaintiff duly paid the said sum to the defendant and at the time of said payment duly protested the same. That said payment was made under duress and compulsion engendered by the threat not only to impose the penalties provided for by statute but to issue a warrant to distrain the goods and chattels of the plaintiff corporation in satisfaction of said demand.

Tenth. Thereafter, again in accordance with the provisions of the statutes and regulations in such cases made and provided, plaintiff filed with the Collector of Internal Revenue, an application for refund of the tax so paid, as well as that portion paid by the application of the certificates of over-assessments as aforesaid, and in support of said application reiterated the claims for obsolescence of buildings and good will. That prior to the filing of the said application for refund, the plaintiff did also under date of February 15th, 1924, based on the same claims for obsolescence, file with the Collector of Internal Revenue an application for refund in due form for $1,339.13 previously paid as income tax for the year 1918.

Eleventh. That the defendant Collector transmitted said applications for refund to the Commissioner of Internal Revenue and the latter has after consideration thereof, rejected the same.

Twelfth. That thereafter, and on or about the 23rd day of March, 1927, again in accordance with the provisions of the statutes and regulations in such cases made and pro- [fol. 8] vided, plaintiff filed with the Collector of Internal

Revenue a second amended claim for refund of the tax paid under protest by reason of said additional assessment, on the ground that more than five years had elapsed since the filing of its tax return for 1918 and that the Statutes of Limitations had run against any further or additional assessment of tax. A copy of said second amended claim for refund is annexed hereto, marked Exhibit "A", and made a part hereof.

Thirteenth. That more than six months have elapsed since the filing of said second amended claim for refund and said claim has not been allowed and no action has been taken thereon by the Commissioner of Internal Revenue.

Fourteenth. Plaintiff alleges that the action of the Commissioner in assessing said additional tax in the sum of $6,847.43 for the year 1918 was unjustified in law and fact and that said sum was illegally and erroneously collected and that the plaintiff is entitled to recover the said sum of $6,847.43 together with the sum of $1,339.13 previously paid and retained by the said Collector, and the sum of $2,720.58 representing over-payments as aforesaid, together with interest from the date of payment for the following reasons, to wit:

In rejecting the claims for refund heretofore referred to, the Commissioner of Internal Revenue and the defendant refused to allow any sum for obsolescence of the buildings and good will of the plaintiff, which if granted would have entitled the plaintiff to an abatement of the taxes which were subsequently the subject of refund and are the sub-
[fol. 9] ject matter of this action, and plaintiff alleges it was entitled thereto for the following reasons:

The buildings of the plaintiff had been erected by it for the purpose of carrying on the manufacture of beer, ale and porter. Prior to the effective date of prohibition in the United States, most of the business of the character in question and the plaintiff in particular, was done in barrels. The plaintiff also operated a bottling department, but prior to the effective date of prohibition, the total output of bottled beer was small in comparison to that in barrels, and the major operations of the plaintiff were carried on in the place devoted particularly to brewing and barreling. The buildings which were located in West 41st

Street, in the City of New York, had been developed to their pre-prohibition size and capacity about the end of 1906. They were of special construction, adap-able only for the business of manufacturing beer, ale and porter and were not economically convertible to any other use whatsoever. After the effective date of prohibition laws, the company discontinued its former business of brewing beer, ale and porter, abandoned a large part of its equipment and the use of a large part of the buildings, made certain alterations and readjustments in some portions of the plant and began the manufacture and sale of non-alcoholic cereal beverages. These two lines of business were different and distinct. The former was well established, the latter a new and uncertain industry. The only part of the former buildings that could be used intact was that devoted to the bottling department.

Fifteenth. The total overage output of beer, ale and porter up to October 28th, 1919, both in bottles and in barrels, [fol. 10] as shown by the following schedule, is 96,332 barrels:

Year	Total output
1905	104,776
1906	119,832
1907	116,384
1908	98,301
1909	97,183
1910	100,849
1911	108,125
1912	103,523
1913	106,229
1914	89,485
1915	91,783
1916	98,567
1917	84,819
1918	77,941
1919 (prior to Oct. 28)	60,682
	1,458,259
Average per year	98,332

Sixteenth. The average annual output of the new business, that of manufacturing cereal beverage, for the period

of 1919, subsequent to October 28th, for the years 1920 to 1924, inclusive, as shown by the following schedule is 41,094 barrels:

Year	Total output
1919 (subsequent to Oct. 28)	4,545
1920	39,029
1921	53,223
1922	54,163
1923	48,772
1924	46,825
Total	246,557
Average per year	41,093

[fol. 11] Seventeenth. As stated before, the output was brewed and sold in barrels and the major operation of the brewery property was devoted thereto. With the adoption of the new business, the greater part of the old building was no longer necessary and most of the business was concentrated in the bottling department.

Eighteenth. The average output in barrels alone for the years 1905 to 1919 (prior to October 28th) as shown in the following schedule, was 84,442 barrels:

Year	Barrels
1905	104,776
1906	119,632
1907	116,384
1908	98,301
1909	97,183
1910	100,849
1911	103,735
1912	90,813
1913	89,069
1914	72,955
1915	68,693
1916	67,477
1917	56,334
1918	44,084
1919	22,446
Total	1,252,531
Average per year	84,442

Nineteenth. The average from October 28th, 1919 to December 31st, 1924, as shown by the following schedule, was [fol. 12] 3651 barrels:

Year	Barrels
1919 (subsequent to Oct. 28)	1,783
1920	10,317
1921	4,094
1922	2,449
1923	1,955
1924	1,310
Total	21,908
Average per year	3,651

Twentieth. The cost of the buildings and additions devoted to the former business of brewing beer, ales and porter at January 31st, 1919 was $238,968.89. A fair allowance for obsolescence thereof for the year 1918 is at least the sum of $41,976.74.

Twenty-first. That the useful value of said buildings was destroyed by the adoption of the Eighteenth Amendment and the passage of the prohibition laws pursuant thereto.

Twenty-second. Plaintiff further alleges that it had prior to the adoption of the Eighteenth Amendment and passage of the prohibition laws pursuant thereto, established a trade and a good will of the value of at least $200,000. Its method of operation on which it had built up its business during preceding years was to furnish capital to owners and operators of cafes, saloons and restaurants, to take back from them chattel mortgage on fixtures and equipment, and to take assignments of the certificates authorizing the traffic in liquors at the places of business con- [fol. 13] ducted by said customers, which gave to the plaintiff practical control of places where its product was being sold. The customers were financially irresponsible and the chattels upon which the securities were taken were not worth 10% of the face amount of the mortgages covering them, but the method of operation established accord between the company and its customers which long experience proved to be of great stability. It became the custom therefore, to consider that a company engaged in plaintiff's line of business had a good will measured by its output.

So well established was this prior to prohibition that brewery trade had a definite and easily marketable selling value, separate and distinct from the plant itself. That is to say, the trade segregated from all other assets of the brewery company, except the chattel mortgages which controlled the trade, had a definite saleable value in the open market. The plaintiff alleges that the value of its trade, prior to the adoption of the Eighteenth Amendment and the passage of the prohibition laws pursuant thereto, was of the value hereinbefore alleged, to wit, the sum of at least $200,000.

Twenty-third. That said good will and trade value were utterly destroyed by the adoption of the Eighteenth Amendment and the passage of the prohibition laws pursuant thereto, and an obsolescence of said value began the 31st day of January, 1918 and continued until the 20th day of January, 1920. That obsolescence of such value in the year 1918 was the sum of at least $95,472.00.

Twenty-fourth. That the Commissioner of Internal Revenue erroneously computed the net income of the corpora- [fol. 14] tion for the year 1918 at the sum of $56,832.02, whereas with a proper allowance of claims for obsolescence of tangible and intangible property, the corporation sustained a deficit in operations for that year entitling it to a total refund of all taxes paid.

For a Second Cause of Action

Twenty-fifth. Plaintiff repeats and realleges as a part of this cause of action, each and all of the allegations contained in paragraphs numbered First to Thirteenth, inclusive with like effect as if herein fully alleged and incorporates herein all of the allegations therein set forth.

Twenty-sixth. Plaintiff alleges that the action of the Collector in demanding and compelling the payment by the plaintiff of the sum of $6,847.43 income and profits taxes for the year 1918 under threat of distraint of its property was unjustified in law and collection of said tax was erroneous and illegal in that more than five years had elapsed since the filing of plaintiff's tax return for the calendar year 1918 and the Statute of Limitations had run against any further or additional assessment of the tax.

For a third cause of action, plaintiff realleges the allegations contained in the first cause of action hereinbefore set forth, so far as the same may be applicable.

Twenty-seventh. That at all the times herein mentioned, plaintiff was and still is a corporation organized under the [fol. 15] laws of the State of New York, and having its principal place of business in the City of New York.

Twenty-eighth. That the defendant was at all such times and still is Collector of Internal Revenue of the United States of America, in the Third District of New York.

Twenty-ninth. That said plaintiff was, prior to and during the years 1918 and 1919 engaged in the manufacture and sale of malt liquors generally known and described as beers, ales and porter, and had been so engaged for a period of forty years. That during that time, it had built up a substantial and lucrative business in said commodities and had invested large sums of money in buildings, plants and equipment for that purpose and in establishing good will.

Thirtieth. That in accordance with the provisions of the statutes of the United States in such cases made and provided, plaintiff herein duly prepared and on or about 15th day of June, 1920, duly filed with the Collector of Internal Revenue for the calendar year 1919, a return showing its net income subject to tax and duly paid the tax thereon shown to be due.

Thirty-first. That thereafter, the Commissioner of Internal Revenue caused an examination to be made of the books of the taxpayer for the calendar year 1917, 1918, 1919 and 1920 and thereupon in accordance with the provisions of the Revenue Act of 1921, did on the 11th day of [fol. 16] January, 1923, address to the taxpayer a letter proposing additional assessments as follows:

1918	$34,352.18
1919	25,532.29

Thirty-second. That in accordance with said statutes and the rules and regulations adopted by the Treasury Department of the United States, pursuant thereto, plaintiff duly appealed to the Commissioner of Internal Revenue alleg-

ing various exceptions to the proposed assessment of additional tax among them being a claim that it was entitled to a reasonable allowance for obsolescence of buildings and good will as a result of the adoption of the Eighteenth Amendment, and the Acts of Congress passed pursuant thereto prohibiting the manufacture and sale of intoxicating beverages and the said taxpayers claimed that with a proper allowance of its claims, it would not be subject to additional taxes for the years in question, but on the contrary, would be entitled to receive a refund of all the taxes already paid by it.

Thirty-third. That such proceedings were duly had before the Commissioner of Internal Revenue, that the claims of the taxpayer were allowed except those for obsolescence of buildings and good will.

Thirty-fourth. Thereafter, over the protest of the plaintiff, said Commissioner of Internal Revenue directed the defendant as Collector of Internal Revenue to assess additional income and profits taxes against the said plaintiff for the year 1919 in the sum of $10,175.45. The said defendant Collector of Internal Revenue did assess said sum [fol. 17] as additional income and profits taxes against the plaintiff for the calendar year 1919 and served a notice and demand for the payment thereof and threatened to impose additional penalties provided by law for failure to make payment within ten days as specified in said notice.

Thirty-fifth. Thereupon on the 11th day of June, 1924, the plaintiff duly paid the said sum to the defendant and at the same time of said payment duly protested the same. That said payment was made under duress and compulsion engendered by the threat not only to impose the penalties provided for by statute, but to issue a warant to distrain the goods and chattels of the plaintiff corporation in satisfaction of said demand.

Thirty-sixth. Thereafter, again in accordance with the provisions of the statutes and regulations in such cases made and provided, plaintiff filed with the Collector of Internal Revenue, an application for refund of the tax so paid and in support of said application reiterated the claims for obsolescence of buildings and good will. That prior to the filing of said application for refund, the plain-

tiff did also under date of February 15th, 1924, based on the same claims for obsolescence, file with the Collector of Internal Revenue an application for refund in due form for $1,008.42 previously paid as income tax for the year 1919.

Thirty-seventh. That the defendant Collector transmitted said applications for refund to the Commissioner of Internal Revenue and the latter has after consideration thereof rejected the same.

[fol. 18] Thirty-eighth. Plaintiff alleges that the action of the Commissioner in assessing said additional tax in the sum of $10,175.45 for the year 1919 was unjustified in law and fact and that said sum was illegally and erroneously collected and that the plaintiff is entitled to recover the said sum of $10,175.45 together with the sum of $1,008.42 previously paid, retained by the said Collector, together with interest from the date of payment for the following reasons, to wit:

In rejecting the claims for refund heretofore referred to, the Commissioner of Internal Revenue and the defendant refused to allow any sum for obsolescence of the buildings and good will of the plaintiff, which if granted would have entitled the plaintiff to an abatement of the taxes which were subsequently the subject of refund and are the subject matter of this action, and plaintiff alleges it was entitled thereto for the following reasons: The buildings of the plaintiff had been erected by it for the purpose of carrying on the manufacture of beer, ale and porter. Prior to the effective date of prohibition in the United States, most of the business of the character in question and the plaintff in particular, was done in barrels. The plaintiff also operated a bottling department, but prior to the effective date of prohibition, the total output of bottled beer was small in comparison to that in barrels, and the major operations of the plaintiff were carried on in the place devoted particularly to brewing and barreling. The buildings which were located in West 41st Street, in the City of New York, had been developed to their pre-prohibition size and capacity about the end of 1908. They were of special construction, adapta-
[fol. 19] ble only for the business of manufacturing beer, ale and porter and were not economically convertible to any other use whatsoever. After the effective date of prohibi-

tion laws, the company discontinued its former business of brewing beer, ales and porter, abandoned a large part of its equipment and the use of a large part of the buildings, made certain alterations and readjustments in some portions of the plant and began the manufacture and sale of non-alcoholic cereal beverages. These two lines of business were different and distinct. The former was well established, the latter a new and uncertain industry. The only part of the former buildings that could be used intact was that devoted to the bottling department.

Thirty-ninth. The total average annual output of beer, ale and porter up to October 26th, 1919, both in bottles and in barrels, as shown by the following schedule, is 98,332 barrels:

[fol. 20]

Year	Total output
1905	104,776
1906	119,632
1907	116,384
1908	98,301
1909	97,183
1910	100,849
1911	108,125
1912	103,523
1913	106,229
1914	89,485
1915	91,763
1916	98,567
1917	84,819
1918	77,941
1919 (prior to Oct. 28)	60,682
Total	1,458,259
Average per year	98,332

Fortieth. The average annual output of the new business, that of manufacturing cereal beverage, for the period of 1919, subsequent to October 28th, for the years, 1920, 1921, 1922, 1923 and 1924, as shown by the following schedule, is 41,093 barrels:

Year	Barrels
1919 (subsequent to Oct. 28)	4,545
1920	39,029
1921	53,223
1922	54,163
1923	48,772
1924	46,825
Total	246,557
Average per year	41,093

[fol. 21] Forty-first. As stated before, the output was brewed and sold in barrels and the major operation of the brewery property was devoted thereto. With the adoption of the new business, the greater part of the old buildings was no longer necessary and most of the business was concentrated in the bottling department.

Forty-second. The average output of barrels alone for the years 1905 to 1919 (prior to October 28th), was 84,442 barrels, as shown by the following schedule:

Year	Barrels
1905	104,776
1906	119,632
1907	116,384
1908	98,301
1909	97,183
1910	100,849
1911	103,735
1912	90,613
1913	89,069
1914	72,955
1915	68,693
1916	67,477
1917	58,334
1918	44,084
1919 (prior to Oct. 28)	22,446
Total	1,252,531
Average per year	84,442

[fol. 22] Forty-third. The average from October 28th, 1919 to December 31st, 1924, as shown by the following schedule, was 3851 barrels:

Year	Barrels
1919 (subsequent to Oct. 28)	1,783
1920	10,317
1921	4,904
1922	2,449
1923	1,955
1924	1,310
Total	21,908
Average per year	3651

Forty-fourth. The cost of the buildings and additions devoted to the former business of brewing beer, ales and portes at January 31st, 1919, was $236,968.89. A fair allowance for obsolescence thereof for the year 1919 is at least the sum of $45,743.88.

Forty-fifth. That the useful value of said buildings were destroyed by the adoption of the Eighteenth Amendment and the passage of the prohibition laws pursuant thereto.

Forty-sixth. Plaintiff further alleges that it had prior to the adoption of the Eighteenth Amendment and passage of the prohibition laws pursuant thereto, established a trade and a good will of the value of at least $200,000. Its method of operation on which it had built up its business during preceding years was to furnish capital to owners and operators of cafes, saloons and restaurants, to take back from [fol. 23] them chattel mortgage on fixtures and equipment, and to take assignment of the certificates authorizing the traffic in liquors at the places of business conducted by said customers, which gave the plaintiff practical control of the places where its product was being sold. The customers were financially irresponsible and the chattels upon which the securities were taken were not worth 10% of the face amount of the mortgages covering them, but the method of operation established accord between the company and its customers which long experience proved to be of great stability. It became the custom therefore, to consider that a company engaged in plaintiff's line of business had a good will measured by its output. So well established was this prior to prohibition, that brewery trade had a definite and easily marketable selling value, separate and distinct from the plant itself. That is to say, the trade segregated from

all other assets of the brewery company, except the chattel mortgages which controlled the trade, had a definite saleable value in the open market. The plaintiff alleges that the value of its trade, prior to the adoption of the Eighteenth Amendment and the passage of the prohibition laws pursuant thereto, was of the value hereinbefore alleged, to wit, the sum of at least $200,000.

Forty-seventh. That said good will and trade value was utterly destroyed by the adoption of the Eighteenth Amendment and the passage of the prohibition laws pursuant thereto, and an absolescence of said value began the 31st day of January, 1918, and continued until the 20th day of January, 1920. The obsolescence of such value in the year 1919 was the sum of at least $104,040.00.

[fol. 24] Forty-eighth. That the Commissioner of Internal Revenue erroneously computed the net income of the corporation for the year 1919 at the sum of $74,838.77, whereas with a proper allowance of claims for obsolescence of tangible and intangible property, the corporation sustained a deficit in operations for that year entitling it to a total refund of all taxes paid.

Wherefore plaintiff demands judgment against the defendant upon the first cause of action for the sum of $10,907.14, upon the second cause of action for the sum of $9,568.01 and upon the third cause of action for the sum of $11,183.87, together with interest as allowed by law and the cost and disbursements of this action.

Paskus, Gordon & Hyman, Attorneys for Plaintiff,
Office & P. O. Address: No. 2 Rector Street, Borough of Manhattan, New York City.

[fol. 25] EXHIBIT A TO AMENDED AND SUPPLEMENTAL COMPLAINT

(Execute Separate Form for Each Tax Period)

Second Amended Claim for Refund

Refund of Taxes Illegally Collected

STATE OF NEW YORK,
County of New York, ss:

(Name of taxpayer or purchaser of stamps:) V. Loewers Gambrinus Brewery Company, (Residence—give street and number as well as city or town and State:) 528 West 42nd Street; (Business Address:) New York City, N. Y.

This deponent, being duly sworn, according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete.

Period	Year
From Jan. 1	1918
To Dec. 31	1918

1. Business in which engaged: Brewing and selling beer, ales and porter.

2. Character of assessment or tax: Income and profits taxes. (State for or upon what the tax was assessed or the stamps affixed.)

[fol. 26] 3. Amount of assessment or stamps purchased: Additional assessment $6,847.43.

4. Reduction of Tax Liability requested (Income and profit tax): $6,847.43.

5. Amount to be abated: ——.

6. Amount to be refunded (or such greater amount as is legally refundable): $6,847.43.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks): June 11th, 1924. (If statement covers income tax liability, Items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: Third, New York.

9. District in which unpaid assessments appears: ——.

10. Amount of over-payment claimed as credit: ——.

11. Unpaid assessment against which credit is asked: Period from —— to ——.

Deponent verily believes that this application should be allowed for the following reasons:

Heretofore the taxpayer filed amended claim for refund in the above sum. Claim for refund has been rejected. Since the rejection, the Supreme Court of the United States has rendered decisions in the cases of Bowers v. New York & Albany Lighterage Co., Bowers v. Seaman, Staples v. Fuller. As to the sum of $4,126.85, which was paid under [fols. 27 & 28] protest on the 11th day of June, 1924, said decisions are applicable, and determine and hold that the collection was illegal and erroneous.

Wherefore taxpayer asks a reconsideration and granting of the claim to the extent of the sum of $4,126.85.

(Signed) Jacob Loewer.

Sworn to and subscribed before me this 21st day of March, 1927. Charles F. Ruderhouser, Notary Public, Bronx Co. No. 94. Cert. filed in N. Y. Co. No. 98.

Duly sworn to by Jacob Loewer. Jurat omitted in printing.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO AMENDED SUPPLEMENTAL COMPLAINT

The defendant above named, by his attorney Charles H. Tuttle, United States Attorney for the Southern District of New York as and for his answer to the amended supplemental complaint herein respectfully pleads on information and belief:

First. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation

contained in Paragraphs "First", "Third", "Fifth", "Sixth", "Seventh", "Fifteenth", "Sixteenth", "Seventeenth", "Eighteenth", "Nineteenth", "Twentieth", "Twenty-First", "Twenty-Second", "Twenty-Third", "Twenty-Seventh", "Twenty-Ninth", "Thirty-First", "Thirty-Second", "Thirty-Third", "Thirty-Ninth", "Fortieth", "Forty-First", "Forty-Second", "Forty-Third", "Forty-Fourth", "Forty-Fifth", "Forty-Sixth" and "Forty-Seventh" of the complaint.

[fol. 30] Second. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph "Fourth" of the complaint except that he admits that a return was filed for income taxes for the calendar year 1918 and that taxes shown to be due on said return were duly paid.

Third. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph "Eighth" of the complaint except that he admits that an additional assessment was made against the plaintiff for the calendar year 1918 in the sum of $8,948.21 and that said additional assessment was satisfied by the application of an over assessment against the plaintiff for the taxable year 1913 in the sum of $60; of an over assessment for the calendar year 1914 in the sum of $60; of an over assessment for the calendar year 1915 for the sum of $60; of an over assessment for the calendar year 1916 in the sum of $120; of an over assessment for the calendar year 1917 in the sum of $1,055.16; of an over assessment for the calendar year 1920 in the sum of $1,365.42,—making a total of $2,720.58, by the abatement on or about May 31, 1924 of the sum of $2,100.78 and by the payment under protest on or about June 11, 1924, of the sum of $4,126.85.

Fourth. Except as admitted in the preceding paragraph, defendant denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph "Ninth" of the complaint.

[fol. 31] Fifth. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph "Tenth" of the complaint except that he admits that a claim for refund in the

sum of $6,847.43 was filed on or about June 24, 1924. That said claim was forwarded to the Commissioner of Internal Revenue on or about August 8, 1924 and is still pending.

Sixth. Except as admitted in the preceding paragraph, defendant denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph "Eleventh" of the complaint.

Seventh. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph "Twelfth" of the complaint except that he admits that a second claim for refund in the sum of $6,847.43 was filed on or about March 24, 1927, and that said claim was forwarded to the Commissioner of Internal Revenue on or about April 6, 1927.

Eighth. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph "Fourteenth" of the complaint except that he denies on information and belief each and every allegation contained in the first paragraph of said paragraph.

Ninth. Denies on information and belief each and every allegation contained in Paragraphs "Thirteenth", "Twenty-Fourth" and "Twenty-Sixth" of the complaint.

[fol. 32] Tenth. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph "Thirtieth" of the complaint except hat he admits that a tax return was filed for the calendar year 1919 and that taxes shown to be due thereon were duly paid.

Eleventh. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph "Thirty-Fourth" of the complaint except that he admits that an additional assessment was made against the plaintiff for the calendar year 1919 in the sum of $11,589.02 and that said additional assessment was satisfied by payment of $1,417.61 on or about May 31, 1924, and by payment of the balance of $10,171.41 under protest on or about June 11, 1924.

Twelfth. Except as admitted in the preceding paragraph, defendant denies that he has any knowledge or in-

formation sufficient to form a belief as to each and every allegation contained in Paragraph "Thirty-Fifth" of the complaint.

Thirteenth. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph "Thirty-Sixth" of the complaint except that he admits that claim was filed on or about June 24, 1924, for the refund of $11,179.83.

Fourteenth. Admits the allegations contained in Paragraph "Thirty-Seventh" of the complaint except that he [fol. 33] denies any knowledge or information as to the rejection of the said claim for refund by the Commissioner of Internal Revenue.

Fifteenth. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph "Thirty-Eighth" of the complaint except that he denies on information and belief each and every allegation contained in the first paragraph of said paragraph.

Sixteenth. Denies on information and belief each and every allegation contained in Paragraph "Forty-Eighth" of the complaint.

As and for a first, separate, complete and partial defense to the first and second causes of action set forth herein defendant alleges on information and belief:

Seventeenth. That the amended claim for refund alleged in Paragraph "Twelfth" of the complaint to have been filed on or about March 23, 1927, was not filed until after the date on which this action was commenced.

Wherefore defendant demands judgment dismissing the complaint together with the costs and disbursements of this action.

Charles H. Tuttle, United States Attorney for the Southern District of New York, Attorney for Defendant. Office & P. O. Address: U. S. Courts & Old P. O. Bldg., Borough of Manhattan, City of New York.

[fol. 34] *Duly sworn to by Charles W. Anderson. Jurat omitted in printing.*

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFF'S FINDINGS OF FACT

The above entitled action having been regularly on the calendar of this Court and having come on to be heard on the 27th and 28th days of November, 1928, and plaintiff having appeared herein by Paskus, Gordon & Hyman, its attorneys, Arthur B. Hyman, of counsel, and the defendant having appeared by Charles H. Tuttle, Esq., United States attorney, Edward Feldman and William E. Davis, Assistant United States attorneys, of counsel and the parties having presented their proofs, now after hearing Arthur B. Hyman, counsel for the plaintiff and Edward Feldman, counsel for the defendant, and due deliberation having been had, I decide and find as follows:

1. That at all the times hereinafter mentioned the plaintiff was and still is a corporation organized under the laws of the State of New York and having its principal place of business in the City of New York.

[fol. 36] 2. That the plaintiff on March 15, 1919 filed its tentative income and profits tax return for the calendar year 1918 and on June 5, 1919, within the extension of time allowed, filed its final income and profits tax return for the calendar year 1918, said final return showing an amount of tax due for said year in the sum of $1,339.13 and that said amount was paid to the defendant on the dates and in the amounts as follows:

March 24, 1919	$234.06
June 9, 1919	1,005.07
Total	$1,339.13

3. That during the year 1924 an additional assessment in the amount of $6,847.43 was levied against the plaintiff on account of income and profits taxes for the calendar year 1918. That the said amount was paid by the defendant crediting against such additional assessments the following sums which it had certified were over assessed:

For the year 1913	$60.00
For the year 1914	60.00
For the year 1915	60.00
For the year 1916	120.00
For the year 1917	1,055.16
For the year 1920	1,365.42
Total	$2,720.58

4. That said amount of $2,720.58 represented over payments made by the plaintiff on account of income and/or profits taxes for such years as indicated in the foregoing table; that the credit of said sums was duly authorized by [fol. 37] the Commission of Internal Revenue and that after crediting said sum of $2,720.58 against said additional assessment there remained an amount unpaid on said additional assessment of $4,126.85; that said amount of $4,126.85 was paid by plaintiff under protest on June 13, 1924.

5. That the total income and profits taxes paid by the plaintiff on account of the year 1918 amounted to $8,186.56.

6. That thereafter the plaintiff duly filed claims for refund for the total amount of $8,186.56 so paid by it as income and profits taxes for the calendar year 1918 and said claims for refund were based upon a claim of right to deduct from income additional amounts on account of allowances claimed for obsolescence in respect of brewery buildings and intangible property and that said claims for refund were rejected by the Commissioner of Internal Revenue. Plaintiff also duly filed an amended claim for refund upon the ground that collection of the additional amount paid on June 13th, 1924, was barred by the statute of limitations in such cases made and provided. No action has been taken by the Commissioner of Internal Revenue upon said amended claim and more than six months have elapsed since its filing.

7. That the net income and profits taxes for the calendar year 1918 assessed against plaintiff as aforesaid were based upon a net income of $56,832.02 determined by the Commissioner of Internal Revenue and that in arriving at such net income the Commissioner allowed no deduction whatsoever

on account of obsolescence in respect to brewery buildings or intangible property.

[fol. 38] 8. That the plaintiff on March 11, 1920 filed its tentative income and profits tax return for the calendar year 1919 and on June 15, 1920 within the extension of time allowed, filed its final income and profits tax return for the calendar year 1919, said final return showing an amount of tax due for said year in the sum of $1,008.42 and that said amount was paid to the defendant on the dates and in the amounts as follows:

March 16, 1920	$252.10
June 29, 1920	756.32
Total	$1,008.42

9. That during the year 1924, an additional assessment of $10,171.41 was levied against the plaintiff on account of income and profits taxes for the calendar year 1919, that said amount was paid by plaintiff to defendant under protest on June 13, 1924.

10. That the total income and profits taxes paid by plaintiff on account of the year 1919 amounted to $11,179.83.

11. That on June 24, 1924, plaintiff duly filed claims for refund in the amount of $11,179.83 representing total income and profits taxes theretofore paid by the plaintiff for the calendar year 1919. That said claims for refund were based upon a claim of right to deduct from income additional amounts on account of allowances for obsolescence claimed in respect of brewery buildings and intangible property. That said claims for refund were rejected by the Commissioner of Internal Revenue.

[fol. 39] 12. That the income and profits taxes for the calendar year 1919 assessed against the plaintiff as aforesaid were based upon a net income of $74,838.77, as determined by the Commissioner of Internal Revenue; that in arriving at said net income the Commissioner allowed no deduction whatsoever on account of obsolescence in respect of brewery buildings or intangible property.

13. That the plaintiff since the year 1879 and until October 29, 1919 has been engaged in the business of manufacturing and selling beers, ales and porter for which purpose it erected buildings and installed the necessary

machinery and equipment in the Borough of Manhattan, City of New York, and in which its operations were carried on at all the times involved in this action.

14. That on the 31st day of January, 1918 it had become a matter of common knowledge and was known to the plaintiff that prohibition would become the law of the land and that as a result of such law persons engaged in the business of manufacturing and selling beers, ales and porter including this plaintiff would suffer obsolescence in the value of their capital assets, and such prohibition became effective January 16, 1920.

15. That at January 31, 1918 the depreciated cost of buildings used by the plaintiff in its manufacturing operations as found by the Commissioner of Internal Revenue was the sum of $153,932.18. That said buildings were constructed especially for the purposes of manufacturing, selling and delivering beers, ales and porter and were not commercially adaptable for any other use.
[fol. 40] That at January 16, 1920 such buildings had no salvage value.

15. That as a result of prohibition and beginning January 31, 1918 and ending January 16, 1920, the plaintiff suffered obsolescence of said buildings equal to the total depreciated cost thereof, to wit: $153,932.18 which should be rateably apportioned over such period.

16. That the plaintiff had built up a valuable trade in the products which it manufactured. That such trade was of the value on March 1, 1913 and at January 31, 1918 of not less than $200,000. That as a result of prohibition the plaintiff suffered obsolescence in the value of its trade equal to the total thereof, to wit: not less than $200,000 which should be apportioned rateably over the obsolescence period, to wit: January 31, 1918, to January 16, 1920.

17. That after making provision for the allowances for obsolescence of either tangible or intangible property as set forth above the plaintiff had no net income for either of the years 1918 or 1919 and that all sums of money paid by it as and for income and excess profits taxes for such years were erroneously and illegally collected.

18. That the sum of $4,126.85 paid under protest by the plaintiff on June 13, 1924 on account of the additional as-

sessment of taxes made by the Commissioner of Internal Revenue against it as and for the year 1918 as hereinbefore set forth was so paid more than five years after the filing of the plaintiff's return for such year.

[fol. 41] From the foregoing findings of fact I reached the following conclusions of law:

That the plaintiff is entitled as a deduction from income for the years 1918 and 1919 of a reasonable allowance for obsolescence of its brewery buildings and its trade.

That such allowance is an amount equal in the case of buildings to the depreciated cost at January 31, 1918, to wit: $153,932.18 and in the case of its trade in the amount of at least $200,000.

That the obsolescence period over which such loss should be spread is from January 31, 1918 to January 16, 1920.

That after the deduction of the allowances above mentioned the plaintiff had no net income for either of the years 1918 or 1919 and that all sums collected by the defendant from it as and for taxes for those years were erroneously and illegally collected.

That in addition thereto the amount of $2,720.58 allowed to the plaintiff by the Commissioner of Internal Revenue as over payments for years prior to 1918 were improperly and illegally credited against an alleged liability for additional taxes for the year 1918 which did not exist in fact and are refundable to the plaintiff.

That collection by the defendant from the plaintiff of $4,126.85 on the 30th day of June, 1924 was barred by the statute of limitations in such cases made and provided.

That plaintiff is entitled to judgment in the sum of $22,091.01 with interest from the date of payment or collection of the amounts making up such sum to a date preceding the date of the refund thereof by not more than thirty days, such date to be determined by the Commissioner of [fol. 42] Internal Revenue; together with the costs and disbursements of this action.

I direct the Clerk to enter judgment in accordance herewith.

Dated New York, April 8, 1929.

F. J. Coleman, Judge of the United States District Court, Southern District of New York.

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S PROPOSED FINDINGS OF FACT

The above entitled action having been regularly on the calendar of this Court and having come on to be heard on the 27th and 28th days of November, 1928, and plaintiff having appeared herein by Paskus, Gordon & Hyman, its attorneys, Arthur B. Hyman, of counsel, and the defendant having appeared by Charles H. Tuttle, Esq., United States attorney, Edward Feldman and William E. Davis, Assistant United States attorneys, of counsel, and the parties having presented their proofs, now after hearing Arthur B. Hyman, counsel for the plaintiff and Edward Feldman, counsel for the defendant and due deliberation having been had, I decide and find as follows:

1. That at all the times hereinafter mentioned the plaintiff was and still is a corporation organized under the laws of the State of New York and having its principal place of business in the City of New York.

[fol. 44] 2. That plaintiff on March 15, 1919 filed its tentative income and profits tax return for the calendar year 1918 and on June 5, 1919 within the extension of time allowed, filed its final income and profits tax return for the calendar year 1918, said final return showing an amount of tax due for said year in the sum of $1,339.13 and that said amount was paid to the defendant on the dates and in the amounts as follows:

March 24, 1919	$234.06
June 19, 1919	1,005.07
Total	$1,339.13

3. That during the year 1924 an additional assessment in the amount of $6,847.43 was levied against the plaintiff on account of income and profits taxes for the calendar year 1918. That the said amount was paid by the plaintiff first by crediting thereto certain certificates of over assessment for other years as follows:

For the year 1913	$60.00
For the year 1914	60.00
For the year 1915	60.00
For the year 1916	120.00
For the year 1917	1,055.16
For the year 1920	1,365.42
Total	$2,720.58

4. That said amount of $2,720.58 represented over payments made by the plaintiff on account of income and/or profits taxes for other years as indicated in the foregoing table; that the credit of said sums was duly authorized [fol. 45] by the Commissioner of Internal Revenue and that after crediting said sum of $2,720.58 against said additional assessment there remained an amount unpaid on said additional assessment of $4,126.85; that said amount of $4,126.85 was paid by plaintiff on June 13, 1924.

5. That the total income and profits taxes paid by the plaintiff on account of the year 1918 amounted to $8,186.56.

6. That on February 14, 1924 plaintiff filed claim for refund of the amount of $1,340.64 which included the amount of $1,339.13 first paid on account of income and profits taxes for the calendar year 1918 as shown by plaintiff's return and $1.51 interest; that said claim for refund was filed within less than five years after the return for 1918 was due. That on June 24, 1924 plaintiff filed claim for refund of the amount of $6,847.43 representing the amount of additional assessment of income and profits taxes for the calendar year 1918 as aforesaid; that said claim for refund was filed within less than two years after payment of said additional assessment of $6,847.43 had been made; that said claims for refund totaled the amount of $8,186.56, being the total amount of income and profits taxes paid by plaintiff for the calendar year 1918.

7. That said claims for refund were based upon a claim of the right to deduct from income additional amounts on account of allowances for obsolescence claimed in respect of brewery buildings and intangible property; that said claims for refund were rejected by the Commissioner of Internal Revenue.

[fol. 46] 8. That the income and profits taxes for the calendar year 1918 assessed against plaintiff as aforesaid were based upon a net income and invested capital as determined by the Commissioner of Internal Revenue as set forth in Bureau Letter of May 6, 1924; that in arriving at the net income there shown of $56,832.02 the Commissioner allowed no deduction whatsoever on account of depreciation, obsolescence, loss of useful value or otherwise in respect of any intangible property; and that in computing said net income of $56,832.02 the only amount allowed by the Commissioner of Internal Revenue for exhaustion, wear, tear and/or obsolescence, in respect of the brewery buildings, was $4,710.42.

9. That in its claim for refund for the calendar years 1918 plaintiff claimed as an allowance for depreciation and obsolescence of brewery buildings an amount of $21,482.50 in addition to and over and above the amount of $4,710.42 allowed by the Commissioner of Internal Revenue and also claimed an allowance for obsolescence of intangible property in the amount of $95,472.00, no part of which was allowed by said Commissioner nor has any allowance in lieu thereof or in substitution therefor been made; that if said deductions were allowed as claimed the net income of plaintiff for the calendar year 1918 would be converted into a net loss and no income or profits taxes would have been due for the calendar year 1918.

10. That the plaintiff on March 11, 1920 filed its tentative income and profits tax return for the calendar year 1919 and on June 15, 1920 within the extension of time [fol. 47] allowed, filed its final income and profits tax return for the calendar year 1919, said final return showing an amount of tax due for said year in the sum of $1,008.42 and that said amount was paid to the defendant on the dates and in the amounts as follows:

March 16, 1920	$252.10
June 29, 1920	756.32
Total	$1,006.42

11. That during the year 1924, an additional assessment in the amount of $10,171.41 was levied against the plain-

tiff on account of income and profits taxes for the calendar year 1919, that said amount was paid by plaintiff to defendant under protest on June 13, 1924.

12. That the total income and profits taxes paid by plaintiff on account of the year 1919 amounted to $11,179.83.

13. That on June 24, 1924, plaintiff filed claims for refund in the amount of $11,179.83 representing total income and profits taxes theretofore paid by the plaintiff for the calendar year 1919. That said claim for refund was filed within less than five years after the return for the calendar year 1917 was due.

14. That said claim for refund was based upon a claim of right to deduct from income additional amounts on account of allowances for obsolescence claimed in respect of brewery buildings and intangible property. That said claim for refund was rejected by the Commissioner of Internal Revenue.

[fol. 48] 15. That the income and profits taxes for the calendar year 1919 assessed against the plaintiff as aforesaid were based upon a net income and invested capital as determined by the Commissioner of Internal Revenue as set forth in Bureau letter of May 6, 1924; that in arriving at the net income there shown of $74,838.77 the Commissioner allowed no deduction whatsoever on account of depreciation, obsolescence, loss of useful value or otherwise in respect of any intangible property; that in computing the said net income of $74,838.77, the only amount allowed by the Commissioner of Internal Revenue for exhaustion, wear, tear and/or obsolescence in respect of the brewery buildings was $4,883.99.

16. That in its claim for refund for the calendar year 1919 plaintiff claimed as deductions from income an allowance for depreciation and obsolescence of the brewery buildings in the amount of $23,659.58 in addition to and over and above the amount allowed as a deduction by the Commissioner of Internal Revenue; that plaintiff also claimed as a deduction from income an allowance for obsolescence of intangible property in the amount of $104,040.00, no part of which has been allowed by said Commissioner of Internal Revenue and no allowance in lieu thereof or in substitution therefor has been made; that if said de-

ductions were allowed as claimed the net income for 1919 as computed by the Commissioner would have been converted into a net loss and no income or profits taxes would have been due for the calendar year 1919.

17. That the amounts of $4,710.42 and $4,883.99 allowed by the Commissioner of Internal Revenue as deductions [fol. 49] for depreciation of brewery buildings for 1918 and 1919, respectively, were computed at the rate of 2 per cent. on the cost of the building plus the cost of improvements; that the computation of said amounts was made as shown by the following table:

Cost of building (exclusive of land) together with improvements at December 31, 1917..	$233,968.89		
Additions during 1918.....	1,552.03		
Total December 31, 1918.....	$235,520.92	@ 2%	$4,710.42
Additions during 1919.....	8,678.36		
Total December 31, 1919.....	$244,199.28	@ 2%	$4,883.99

18. That said allowances represent a correct deduction from income for wear and tear on said brewery buildings but include no allowance for obsolescence or loss of useful value.

19. That the plaintiff since the year 1878 and until October 29, 1919 has been engaged in the business of manufacturing and selling beers, ales and porter for which purpose it erected buildings and installed the necessary machinery and equipment in the Borough of Manhattan, City of New York, and in which its operations were carried on at all the times involved in this action.

20. That at January 31, 1919 the depreciated cost of buildings used by the plaintiff in its manufacturing operations as found by the Commissioner of Internal Revenue [fol. 50] was the sum of $153,932.18. That said buildings were constructed especially for the purpose of manufacturing, selling and delivering beers, ales and porter.

21. With the advent of prohibition it became illegal to manufacture beers, ales and porter having an alcoholic content in excess of one-half of one per cent. That said buildings could still be used for the manufacture of beers, ales and porter in excess of one-half of one per cent, but that the use for such purpose was illegal and accordingly

the manufacture of such beverages was discontinued by plaintiff when the Prohibition Law became effective.

22. That subsequent to Prohibition plaintiff to a small extent continued the manufacture of beers, ales and porter having an alcoholic content not in excess of one-half of one per cent and it still continues to manufacture such beverages to a small extent.

23. The manufacture of such non-alcoholic beverages does not require the use of all the space used by the plaintiff prior to Prohibition. All of these buildings, however, are in use. Of the seven buildings owned by the plaintiff the four ice houses are used not only in the manufacture of non-alcoholic beverages, but also in the business of a cold storage warehouse. The space used for a cold storage warehouse was leased to a corporation owned by the same interests that own the plaintiff. The brew house is now being used in the manufacture of non-alcoholic beverages. The boiler house is similarly used. The building housing [fol. 51] the engine room, the copper shop and the pump room is used in the same manner. The two upper floors of the main building are now leased for the storage of theatrical scenery.

24. All of plaintiff's buildings have a value in use. They have an actual value in excess of $200,000. If the buildings were torn down they would have no salvage value. Considering plaintiff's land and buildings as one unit, their market value has increased since prohibition.

25. Plaintiff suffered no loss on account of obsolescence or depreciation of buildings owing to prohibition.

26. That prior to prohibition plaintiff built up a trade for its product in the following manner: It loaned money to various individuals for the purpose of equipping saloons and as security for the loan plaintiff took a chattel mortgage on the fixtures and on the lease and an assignment of the saloon keeper's license. Said mortgage provided that the saloon keeper must buy all its beers, ales, and porter from the plaintiff.

27. Said mortgages and assignments of licenses had an actual value over and above their face amount. This value was due entirely to the fact that the saloon keeper who gave

the mortgage was under an obligation to purchase his alcoholic beverage from the plaintiff. The value of the mortgages depended largely upon the number of barrels of beer which the mortgagor purchased yearly.

[fol. 52] 28. The mortgages were all for a period of one year and were registered pursuant to the chattel mortgage law of the State of New York. The value over and above their face amount, of the mortgages held on March 1, 1913, was $ — ; the value over and above their face amount of the mortgages held on January 1, 1918 was $ —.

29. Prohibition destroyed the value of these mortgages in excess of their face value. All losses up to the face value, which plaintiff suffered in these mortgages, were claimed by plaintiff in its tax returns as deductions, and these claims were allowed by the Commissioner of Internal Revenue.

30. The plaintiff has suffered no loss in the value of its buildings or good will in excess of the amount heretofore allowed by the Commissioner of Internal Revenue.

From the foregoing findings of fact, I have reached the following conclusions of law:

1. That the plaintiff is not entitled to a deduction from income for the years 1918 and 1919, on account of obsolescence of either its brewery building or its mortgages in excess of their face value.

2. That defendant is entitled to judgment dismissing complaint on the merits, together with the costs and disbursements of this action.

All findings are disallowed, except 21 and 22, which are allowed with exception to defendant.

(Signed) Frank J. Coleman, U. S. D. J.

[fol. 53] In United States District Court

[Title omitted]

Exceptions to Findings of Fact

The defendant, Charles W. Anderson, hereby excepts to the findings of fact made by the Court herein numbered 3, 4, 6, 7, 11, 12, 14, both findings numbered 15 and findings

numbered 16, 17 and 18, and defendant further excepts to the Courts' conclusion of law based upon said findings.

Defendant further hereby excepts to the Court's refusal to find defendant's proposed findings of fact numbered 1 to 30 and defendant further excepts to the findings of fact made by the Court by allowing defendant's findings numbered 21 and 22 after the same were amended by the Court, and defendant further excepts to the Court's refusal to make conclusions of law as requested by the defendant.

Charles H. Tuttle.

The above exceptions are hereby allowed.

Frank J. Coleman, U. S. D. J.

[fol. 54] In United States District Court, Southern District of New York

L. 35/118

V. Loewers Gambrinus Brewery Co., Plaintiff,

against

Charles W. Anderson, Individually and as Collector of Internal Revenue of the United States of America, Defendant

Judgment

The above entitled action having been regularly upon the calendar of this court and having come on for trial before Honorable Frank J. Coleman, District Judge, on the 27th and 28th days of November, 1928, in the United States Courtroom, Old Post Office Building, in the Borough of Manhattan, City of New York, and the plaintiff having appeared herein by Paskus, Gordon & Hyman, its attorneys, Arthur B. Hyman, of counsel, and the defendant having appeared by Charles H. Tuttle, United States Attorney, Edward Feldman and William E. Davis, Assistant United States Attorneys, of counsel, and a trial by jury having been duly waived, the parties having presented their proofs and the court having duly made its findings of fact and conclusions of law, dated April 1st, 1929, directing judg-

ment in favor of the plaintiff and against the defendant for the sum of Twenty-two thousand ninety-one dollars [fol. 55] and 1/100 ($22,091.01), with interest from the date of payment or collection of the amounts by the said defendant, making up such sum, to the date preceeding the refund thereof by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue, together with the costs and disbursements of this action, and the plaintiff's costs having been duly adjusted at $18.80,

Now, on motion of Paskus, Gordon & Hyman, attorneys for the plaintiff, it is adjudged that the plaintiff, V. Loewers Gambrinus Brewery Co. do recover of the defendant, Charles W. Anderson, Collector of Internal Revenue of the United States of America, for the Third District of New York, the sum of Twenty-two thousand ninety-one dollars and 1/100 ($22,091.01) with interest from the date of payment or collection of the amounts making up such sum as disclosed in the findings of fact and conclusions of law to a date preceeding the date of the refund thereof, by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue, together with the sum of Eighteen and 80/100 ($18.80) Dollars, costs of this action.

Judgment this 10th day of April, 1929.

Alex Gilcrist, Jr., Clerk.

[fol. 56] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION WAIVING JURY

It is hereby stipulated by and between the attorneys for the respective parties that the issues in this action be tried by the court without a jury, such jury being hereby expressly waived.

Dated New York, November 27, 1928.

Paskus, Gordon & Hyman, Attorney for Plaintiff.

Charles H. Tuttle, United States Attorney, Attorney for Defendant.

[fol. 57] In United States District Court, Southern District of New York

Before Hon. Frank J. Coleman, J.

L. 35/118

V. Loewer's Gambrinus Brewery Co., Plaintiff,

vs.

Charles W. Anderson, Individually and as Collector of Internal Revenue of the United States of America, Defendant

Defendant's Bill of Exceptions

New York, November 27th, 1928.

Appearances of Counsel

Messrs. Paskus, Gordon & Hyman, Attorneys for Plaintiff, Arthur B. Hyman, Esq., of Counsel.

Charles H. Tuttle, Esq., United States Attorney; Edward Feldman, Esq., and William E. Davis, Esq., Assistant United States Attorneys, for the Government.

Colloquy Between Court and Counsel

Mr. Hyman: It is stipulated by and between the attorneys for the respective parties, with the consent of the Court, that a jury be waived. (Stipulation signed and filed.) I think that is all that is necessary?

[fol. 58] Mr. Feldman: Yes.

Mr. Hyman: I suppose your Honor would like to have me make an opening statement of the case?

The Court: Yes.

Mr. Hyman: The plaintiff in this action was, up to the advent of prohibition, engaged in the manufacture of beer, ales and porters, and in the various years with which we are here concerned, which are 1918 and 1919, it duly filed its income tax returns, and reported certain net income, and paid a certain amount of taxes thereon.

Subsequently the books and records of the corporation were audited in due course by representatives of the Bureau of Internal Revenue, and as a result of that audit and investigation, they suggested a liability to tax of something like $59,000 additional.

Thereupon, due proceedings were had before the Bureau, as is customary—the filing of protests and briefs, with the final result that there was an additional tax assessed of about $14,000. It amounted to about eight thousand and odd dollars for 1919, and six thousand and odd dollars for 1918.

Before the Bureau of Internal Revenue the taxpayer filed a printed record—a verified record—in which, among other things, it claimed two deductions, which were disallowed. One deduction was for obsolescence of its buildings, due to prohibition, and the other was for the obsolescence of the value of its intangibles, consisting of a trade which had a definite, fixed market value; and it had also claimed at the same time an allowance for obsolescence of its equipment, machinery and plant devoted to the brewing business. The allowance was granted so far as the [fol. 59] machinery and equipment were concerned. It was refused, however, so far as the buildings and the good will were concerned.

If the claims of the plaintiff in this case are sustained by the Court, there will be no tax, and the amounts which have been paid will be refundable. These amounts, as I stated before, were the additional taxes of eight thousand and six thousand dollars respectively, plus the small amounts which had been paid on the filing of the original returns, amounting to about $2300 or $2400. So there will be presented to your Honor for determination those two questions: First, is the plaintiff entitled, under the statute, to deduct from its income an amount equal to the loss in value of the buildings which were devoted to its industry, as a result of the Prohibition Amendment; and is it also entitled to deduct from income an allowance——

The Court (interposing): Will you excuse me a moment while I take the verdict of a jury?

Mr. Hyman: Yes, surely.

Mr. Hyman: I was about to say that the questions for your Honor's determination here are two questions: What

amount, if any, the plaintiff is entitled to for obsolescence or loss of value on the buildings which were devoted to this industry, and the loss of its trade value.

Your Honor no doubt has had, in your experience here, contact with the provisions of the statute which is involved here.

The Revenue Act of 1918 provides that a taxpayer is entitled to deduct from his gross income a reasonable allowance for exhaustion, wear and tear, including a reasonable allowance for oblescence of property used in his trade or business.

The figures will be arrived at in this way: In the Bureau [fol. 60] we agreed on depreciated costs of these buildings. The figure at December 31st, 1917, was approximately $234,000. That represents the depreciated cost at that date, and we, of course, have had to compute a month's further depreciation for the reason that it is the view adopted and fixed by the Bureau of Internal Revenue, and generally acquiesced in, that the obsolescence period due to prohibition began on the 31st of January, 1918, and ended on the 16th day of January, 1920. Therefore, if the plaintiff is entitled to its claim for obsolescence, as we respectfully contend, that amount must be spread—apportioned to the periods of 1918 and 1919 falling within the obsolescent period.

I think there will be no dispute about that. That period, as I said, was fixed by their own rulings, and has been acquiesced in by the Board of Tax Appeals. Here and there they have set up a different period within that period, but for the most part that period has been adhered to.

Now, as I said, we start very easily with the stipulated figure, and we also start with a——

The Court (interposing): The depreciated value or depreciated cost? Do you mean the original cost?

Mr. Hyman: Yes.

The Court: Less an amount of depreciation?

Mr. Hyman: Yes. When we speak of "depreciation", the fixed rate which we agreed upon was 2 per cent per annum on these buildings. That was to take care of ordinary wear and tear, and it is stipulated that in determining our net income for the years 1918 and 1919, no allow-

ance whatever has been made for obsolescence of any char-
[fol. 61] acter, and only the amount of 2 per cent. has been allowed. Therefore, whatever we may demonstrate by virtue of the figures and evidence presented here, above that 2 per cent., the natural write-off for exhaustion, wear and tear, will be the figure which your Honor would have to allow as a deduction against income, spread over the period.

Now, as to that issue, I might say this: It has always been the view of the Bureau that the statute applied and they granted an allowance to anybody engaged in an industry that was affected by the Prohibition Amendment, both as to tangibles and intangibles. However, as the years went by they evolved little off-shoots from that doctrine, and finally in the case of brewers—and when I say "finally", it was just about the time this case came up for their consideration, because it had been allowed in prior instances——

The Court (interposing): When was that?

Mr. Hyman: That came up about 1923, was it not?

Mr. Feldman: Yes.

Mr. Hyman: About 1922 or 1923 when they first began a slight departure from the rule that they had enunciated before. Then they took the position, with regard to tangible assets, that they had to be abandoned before the allowance for obsolescence could be granted.

Now, I propose to try to show to your Honor that that is without any reason to support it; that it had no foundation, to start with, and I believe that your Honor will come to the conclusion that the obsolescence provided by the statute has nothing to do with abandonment; and that it was intended to take care of the loss in the dollar and cents
[fol. 62] value of a piece of property; as, for example, if at the beginning of the obsolescence period they had an asset which was worth $100,000, and at the end of the obsolescence period that asset had depreciated in value until it had a market value, we will say, for the sake of argument, of either nothing—or let us say that it then had, regardless of what I did with the property, that it had a value of $100,000 at the beginning, and a value of nothing at the end, then if there is any force in the doctrine of obsolescence at all or in the statutory allowance, that $100,000 is a loss

in the value of the assets, which is to be spread over the obsolescent period.

The Court: Were these buildings peculiarly adapted to brewing?

Mr. Hyman: Yes. I was coming to that, your Honor. As you will find, when you come to examine into the legal aspect of this case, and may I say that you are going to have a most important question for decision than you now have. I just argued the same question before the Board of Tax Appeals on Monday at very great length, and I may say, with due modesty, that I think, so far as the presiding member there is concerned, he is convinced that there never was anything in that question of abandonment of tangible property as a condition for granting an allowance for obsolescence; and the reason for that will be apparent when we come to a discussion of the law, after our evidence is in.

Now, about these buildings. You will find when you come to a consideration of the questions, that over and over again there have been repeated considerations of cases involving [fol. 63] brewers, and there does not seem to have been anything but unanimity on the proposition that they were subject to obsolescence. That has been definitely decided; that is, that their assets were subject to obsolescence, and the only question that has ever been agitated is, What are they entitled to? That is, the amount that they are entitled to, and whether they are entitled to anything at all for loss of value of what we call "intangibles"—good will or trade.

Now, on the good will question, one of the Circuit Courts of Appeals has decided that there is no allowance intended in the statute, and that has been followed directly by the Board of Tax Appeals. That question I also argued there, explaining that my reason for it was that I believed that I can demonstrate, with all due deference to the Circuit Court of Appeals——

The Court (interposing): Which circuit was it?

Mr. Hyman: The Eighth Circuit.

The Court: And who wrote the opinion?

Mr. Hyman: Judge Kenyon, I think. I thought I could demonstrate, and I say it with all due humility and mod-

esty, that the Court was entirely wrong, had reached a very erroneous construction of the statute, and instead of giving it the liberal consideration or construction that all tax statutes are accorded, they had gone to the greatest possible length to contort the natural effect of that statute, which was intended to give an allowance to remedy a situation which Congress was confronted with at the very time they passed this statute, namely, that very shortly a very huge industry in this country was going to be legislated out of business.

The Court: What is the wording of the statute?

Mr. Hyman: The wording is just as I gave it to you. [fol. 64] It says that there shall be among the deductions from gross income, which are subdivided and numbered—there is one particular subdivision which says: "A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

Now, I will tell you how the Circuit Court of Appeals reached its conclusion on this obsolescence question. They examined the views of the Bureau of Internal Revenue, which appear to me, and which appeared to them, I think, quite contrary to what they were about to decide themselves, but they concluded that there was not sufficient strength or length in the line of decisions on that subject to make it necessary to give the usual weight to the Bureau's decision, and they concluded, in effect, that it was a case of first impression. So they arrived at the conclusion that good will—and bear in mind that in that case only good will was involved, and when I speak of "good will", I mean what was the value in dollars and cents, based upon an examination of the invested capital of the taxpayer, and the return which he received. In other words, attributing, let us say, eight per cent. to the value of tangible assets that they were using in business, we would then have a residuary income, which was not so used up, to determine the value of intangibles from, and the rule was to determine it, for example, on 15 per cent. of the capitalization basis, so that it would be six and a half times that amount of income.

Now, then, the Circuit Court of Appeals, taking that as a case of first impression, did something that seemed to

me that no other court has ever done before with this ques-
[fol. 65] tion of the statute under consideration. They said it became necessary, in order to solve so great a question as this, which was going to involve hundreds of millions of dollars, to resort to dictionaries to find out what the meaning of the word "including" was, as used in the statute; and they said that since "including" was coupled with "a reasonable amount for exhaustion, wear and tear of property", they were going to hold that "including" meant including an allowance for obsolescence of the same character of property as that which was subject to exhaustion, wear and tear. Practically they reached the conclusion that that meant physical property—that is, such as a desk or a chair, or a piece of machinery that would exhaust over a lapse of time, or that wear and tear would destroy it.

The Court: Do accountants generally recognize obsolescence with regard to intangibles?

Mr. Hyman: In this sense they do not. They say that an intangible asset, which is represented by good will, inheres in the business, and as long as we assume a continuing business we cannot take care, by any allowance of that sort of an asset, for the reason that instead of exhausting, it grows more valuable all the time. That, in effect, was the view of the Circuit Court of Appeals, that this was not an exhaustible asset.

Now, while there is a difference in the type of assets which I am going to present to your Honor—a decided difference—sufficient difference, I think, to make a distinction in the result that you would reach, nevertheless, I am still strong for the proposition that that was a misconstruction of the statute.

[fol. 66] Now, I would not say that, of course—I would not say that what the Circuit Court of Appeals had done was wrong, were it not for the fact that after a thorough examination of the question, I found out that something—somebody had failed to present to them concrete evidence to indicate their error, and, therefore, I said, with all that deference that they are entitled to, that I thought that decision ought not to and never will be followed, if it goes to the Supreme Court.

Now, in the Red Wing case they denied certiorari in the Supreme Court. Of course, we do not know why.

The Court: That is the case that is mentioned here?

Mr. Hyman: Yes. We do not know why; but we do know that it has been repeatedly decided that that is no evidence that the Supreme Court concurs at all in the decision or result reached. There may be a number of reasons why it did not go to the Supreme Court—as, for example, one of the best reasons I can think of is one that Judge Clark, formerly of the Supreme Court, gave to us at the Bar Association one night, when he said, "We have a rule about petitions for certiorari, and we rigidly enforce it: If anybody wants to get into our Court on certiorari from the Circuit Court of Appeals, we require that they succinctly state the exact questions of law that are to be reviewed, and approximately the state of the record—that is, what specific questions of fact are involved". And he said, "We actually get petitions for certiorari that cover anywhere from 50 to 150 pages, and the moment we get one of those, the petition for certiorari is denied; we will not be annoyed, after [fol. 67] repeated statements of our rules and warning to the Bar."

I ran across a record at one time—I think it was in the "United States Daily", where they had a whole list of the action of the Supreme Court for that term, one after another, and it was commented upon that, for instance, "This petition covers 70 pages", and another petition so many pages, and "The writ is denied". But in the dissenting opinion in the Manhattan Brewing Company case, which is the leading case before the Board of Tax Appeals, where they followed religiously the decision of the Circuit Court of Appeals, there is a very strong dissent. I know your Honor will enjoy every moment of contact with this question, and you are going to enjoy reading the views of the Court there, following the Red Wing case. The member who dissented in a very lengthy opinion there said that even if he conceded that good will was of a type of asset that was not generally exhaustible, it did not follow that it never was, and that circumstances would not make it an exhaustible asset. He said, for example, "Here we have adequate proof that the contrary is the fact, because here is an asset, the good will of this Manhattan Brewing Company, which, let us say, is worth $1,000,000, and which has been totally destroyed. With the beginning of the obsolescent

period which is fixed, and extending over the period of two years, we know they will lose that $1,000,000, so that though it is not generally an exhaustible asset, facts and circumstances may exhaust it".

The Court: Let me see the statute for a moment.

Mr. Hyman: Yes (handing paper to the Court). That is the statute that is involved. I do not know what brief that [fol. 68] is that I have handed your Honor. You will note that there is no limitation there, your Honor, at all, on the character of asset or anything about it. Up to this point everybody concedes that that is an asset that is used in the trade or business.

The Court: This is the first time that I personally have ever heard of the word "obsolescent" being applied to intangibles. I studied accountancy once, and since then I have always been considerably interested in matters of accounting, and in that somewhat limited experience I never heard of obsolescence being used in connection with intangible property.

Mr. Hyman: It is not generally used as a matter of accountancy for the reason that I have pointed out, because you do not exhaust good will. There is nothing you can do about good will that disappears. You can write it up on your books or down on your books.

The Court: There are many occasions when good will is lost.

Mr. Hyman: Yes, and then it should be written off the books.

The Court: And would you call that obsolescence?

Mr. Hyman: Depending on the circumstances which caused it, yes.

The Court: For instance, if the Western Electric Company abandons a branch of its business involving, say, electric fixtures, to an outside concern, is that an obsolescence of good will?

Mr. Hyman: If good will could fairly be attributed to that portion of the business.

The Court: Of course, there would be good will there [fol. 69] probably worth millions of dollars.

Mr. Hyman: It depends on whether some economic upheaval created that condition. They would lose the good will voluntarily in the case you have put; they would

have simply quit; but in the case of prohibition it was a condition that was forced upon them. The good will was destroyed by virtue of an act of Congress.

The Court: In each case there is the same exhaustion of assets, is there not?

Mr. Hyman: Yes, sir.

The Court: In one case voluntary, and in the other case involuntary?

Mr. Hyman: Precisely.

The Court: And in one case you say it is subject to obsolescence, and in the other case not?

Mr. Hyman: No, I do not say that, but I say that it is not obsolescence in a case where somebody suddenly determines to discontinue a business; because obsolescence has this inherent in it, that some condition has come along or arisen which is abnormal, and which interferes with the normal useful life of an asset. It destroys it, in other words, before its day is run.

Now, the definition in Webster is that—it is not very helpful, but it says that it is a state of becoming obsolete, a state of falling into disuse or neglect; and while that throws some light on it, the helpful way to consider it is to resolve it into a practical matter of what has happened to the dollars and cents value of an asset as the result of an economic upheaval.

The Court: Is not the very essence of obsolescence this: That a thing that has become obsolete or obsolescent remains, but its use is gone?

[fol. 70] Mr. Hyman: Yes, that is right.

The Court: Now, how can you apply that to good will? In the case of good will the thing itself is gone, is it not?

Mr. Hyman: Yes, of course.

The Court: It is not a diminution in use, but the thing itself which you claim to be obsolete is gone. If this desk, for instance, were utterly destroyed, it would be a misnomer to say that it was obsolete.

Mr. Hyman: Yes, quite so.

The Court: The word "obsolescence" presupposes the existence of a thing, and a change in its relations.

Mr. Hyman: Yes.

The Court: Its relation to needs.

Mr. Hyman: It is economic, in other words, and not physical.

The Court: Yes. Now, you come to the matter of good will in this case, and the good will has gone?

Mr. Hyman: Yes.

The Court: It is not obsolescent?

Mr. Hyman: It was obsolescent until it became entirely destroyed.

The Court: That is an entirely different use of the word "obsolescence" than any I had ever heard, and different from anything that is applied in accountancy.

Mr. Hyman: Yes, it is, and yet——

The Court (interposing): So that your proposition, then, comes down to this: That this word "obsolescence" has a meaning in this statute which it has in nothing else?

Mr. Hyman: No, I will not say that.

[fol. 71] The Court: It is an entirely new meaning?

Mr. Hyman: No, I will not say that.

The Court: Well, can you tell me where else it has the meaning that you contend for?

Mr. Hyman: Yes. If you start off first with a tangible asset, and assume that there is a good article in use, and say that now it is not going to live for ten years as we anticipated it would—which is the ordinary life accorded to it—and that in the interval of the next two years a great part of the capital value of that asset is going to be destroyed, then we have got to take up that slack. That proves your Honor's statement or theory that it is an economic change in the value of the asset. That is quite true, of course, and as applied to tangibles, it is the perfection of truth.

Now, when we extend it and come to an examination on the intangible side of it, we still come to the point that at the beginning of the period we have a value. It is not going to be destroyed then, but it is going to be destroyed at the end of the obsolescence period. It is all right now, but as a matter of sound accounting practice—and under the statute we are compelled to account in units of time measured by one year—we have to, as accountants, absorb the loss that we are going to face two years from now, over the period from the beginning to the end.

Now, your Honor might say, "Well, is not that a loss—an actual loss sustained at the end of the period, rather

than an obsolescence sustained over the period"? There could be a tremendous amount of argument on that phase of the question, but the apparently accepted theory on all these questions is that at a certain date—January 31st, [fol. 72] 1918,—every taxpayer in the United States could anticipate that at January 16th, 1920, he was going to be put out of business—taxpayers of the class involved here. Therefore, it behooved him to get his capital values back, the loss of which he had sustained by prohibition, over that period. It has been recognized, and the Board of Tax Appeals, where there has been an abandonment and a claim of loss under the obsolescence statute, which was due to prohibition, have said, "No, we will not allow it as a loss; it was an obsolescence deduction; it should have been anticipated at the beginning of the period, and instead of being all taken in one year, it should be pro-rated over the period".

The Court: Well, you are speaking of tangibles now?

Mr. Hyman: Yes, but I want to show what the accountant's theory is. You must apply it, if it is a sound theory —you must apply it in the interpretation of the statute, to whatever we can prove has been rendered obsolete at the end of the period, and so our intangible asset is no different in that respect than our tangible asset.

The Court: But, Mr. Hyman, what you say might support an argument that the word "exhaustion" would include a diminution of good will——

Mr. Hyman (interposing): Yes, that has been the conclusion reached by the Circuit Court of Appeals, in this way; that they say that the word "obsolescence" is an enlargement of "exhaustion". In other words, it is an addition to "exhaustion".

The Court: Do they say it is an enlargement?

Mr. Hyman: Yes.

The Court: I would have inferred that it might have per- [fol. 73] haps been construed as one category of exhaustion.

Mr. Hyman: As a separate category?

The Court: Yes; as one class of exhaustion.

Mr. Hyman: Well, in effect that is what they say.

The Court: Specifying one class of exhaustion, which might not otherwise be included in the construction of the statute.

Mr. Hyman: I agree with your Honor on that, but they did not think so.

The Court: I am only trying to find out the theory of it.

Mr. Hyman: Yes.

The Court: Now, if that is so, it might well be that the word "exhaustion" would include this diminution of good will, even though the word "obsolescence" did not include it.

Mr. Hyman: Except that you would be confronted then with the argument that "exhaustion" in its generally accepted meaning applies to something that does, in fact, generally exhaust. Therefore, I said that Mr. Trammel's theory was sound,—that even if you say that this is not generally an exhaustible asset, it has become an exhaustible asset by reason of the passage of the prohibition amendment; and I think that is sound reasoning. But my own point of view is that that is not necessary. He was attempting to show that no matter how you view it, even if you view it as the Circuit Court of Appeals did, that the decision of the Board should have been the contrary, and that there should have been an allowance for loss of this good will, spread over the obsolescence period; but in my [fol. 74] view, sir, it is intended not to refer to exhaustible assets, but to all character of assets.

The Court: Well, I have never seen the word "obsolescence" given the use that you say it should be given.

Mr. Hyman: The Bureau gave it that meaning for a time. They decided definitely up to the time this case came up, that a wine broker or grower was entitled to obsolescence for the loss of his good will, provided he could show that it was an assignable asset. That is, that it could be carried on without him, and was not truly a personal element. They reached so many theories, and they would stand on a principle for a while, but every case was an exception to it. That was the great difficulty, and they got themselves involved in vastly contradictory decisions, and it was until about this time when they said, "The only thing for us to do is to disallow these good will claims of brewers, and let them go and fight it out".

The Court: You are confining this to good will, and not to any other form of intangibles?

Mr. Hyman: It is a different form than that which was considered.

The Court: You are not including going value?

Mr. Hyman: No, not in this case.

The Court: Just the good will as such?

Mr. Hyman: No. Here is what our good will value is in this case, your Honor: in the Metropolitan District—that is, all around this vicinity, and I have found in some other jurisdiction, too, the sales of a brewery—that is, the barrelage trade had a very definite market value. It could be sold at any time, entirely distinct and separate from the brewing plant itself; and I propose to show you in this case innu- [fol. 75] merable sales of brewing company trade. That comes about, of course, by reason of the method in which brewers did business in New York. They acquired mortgages on the leasehold, they financed the saloon keeper, they fitted out the saloon or loaned him the money to fit his place out, and they advanced him his license money. They had absolutely complete control over the trade of the saloon keeper, and a mortgage on his leasehold, and on his fixtures, payable on demand, and a power of attorney on his license, which authorized the surrender of it at any time they chose. Every brewer did business that same way. So that they had something definite that they could control, and if as was the natural economic progress, the bigger brewers got still bigger, and the small brewers went out of business, the big ones gobbling up the trade as rapidly as they could, by purchase, we can show you barrelage value of the trade definitely fixed by experts, and also by instances of sales themselves. So that you see the type of intangible that is concerned here is sui generis. It is not the type of asset that was lost, which inheres in a going business, as your Honor suggested. It is totally different. It was in the nature of a tangible rather than an intangible asset, and, of course, it was destroyed, beyond any question, because when prohibition struck, all our customers who were tied to us, disappeared, and we did not have anybody to sell to, and, therefore, the total value, in that way, of that trade, was destroyed, just the same as if you had taken an axe and chopped off its neck. That is the type of intangible asset that we are seeking an allowance for here. It is far more definite and much easier to fix, and the only [fol. 76] question that arises is as to whether the statute

includes it, and whether it should be spread over the two-year period, or taken as a loss in 1920 or 1919, when we discontinued the brewing business. The Board has held that where there was an abandonment in 1919, that the obsolescence period stopped there, because the asset was then obsolete.

The Court: Will you enlighten me on this: Why can there not be a slight overlapping of the obsolescence on the buildings and your so-called obsolescene on this intangible thing? The obsolescence on the building means a loss of value, because of having to give up the use to which the buildings were put. Now, that use was the use for the trade, the loss of which you claim for under another item. There is a connection, without question, between the two items of obsolescence. Is there not, perhaps, an overlapping?

Mr. Hyman: I would not think so, your Honor, because you have got your dollars and cents question again. You have your depreciated cost of your buildings, which you have got to recoup over the obsolescence period. For example, our cooperage has been allowed as obsolescent; portions of our machinery and equipment and plant have been allowed as obsolescent. After all, you have to take your dollar and cents depreciated cost at a given date, and recoup that first. Now, if alongside of that we place an intangible value, we have to get that back too, if the statute covers us, so that there is no overlapping, because 100 per cent. of our assets, less whatever residual value we show exists, is to be recouped—the theory of obsolescence being, of course, and nobody will challenge this, I guess, that its object is to return to the taxpayer out of income the dollar [fol. 77] value of his capital asset, so that in every moment of his existence he has a dollar in another form to compensate for the lost dollar which has been exhausted. That is the theory—the accountant's theory, and the legal theory as well.

As I said, we are supposed to account in a unit of time in these cases, and, therefore, while it is not philosophically correct to say that we had an exact amount of exhaustion in twelve months, before there was another exhaustion in another twelve months, or that we could say that this machine exhausted differently or the same amount in this

twelve months as it will in five years hence in another twelve months' period—philos-phically there is not any sense in that proposition, because the useful value of a machine, for example, would drop with the first few weeks of use. It would then be a second-hand machine, but its actual dollar and cents value would necessarily exhaust much more rapidly when it was new. On a mathematical calculation by accountants they only have, of course, one way of accounting, and that is by disregarding the philosophy of deduction and taking into account only the mathematics of it and saying, "We have got to consider that this will last for five years, and take off 20 per cent. in each twelve months period". Actually if we did not have twelve month period, we would simply take it off over the five year period, and whether it exhausted 50 per cent. the first year and 30 per cent. the next year, and so on down the line, would not matter, because it would all be taken up in the full period.

But when we are compelled by statute to account in yearly periods, the mathematics of it makes it necessary for us to take a just proportion of it in each year. That, [fol. 78] of course, destroys the philosophy to that extent, but actually you cannot disregard it. You are entitled to what the statute calls a reasonable allowance. Now, necessarily, that is not susceptible of mathematically accurate computation. "Reasonable" simply excludes everything that is unreasonable, and as the trier of the facts, you have to determine what is a reasonable allowance to compensate for that loss or to put it in the other way, what is the reasonable amount of the loss which has been sustained, which we have got to be compensated for in an allowance on the income?

Now, that is what the statute was designed for, and there cannot be any doubt about that, because the history of the statute shows it. Originally, the statute provided for depreciation. It did not use these words, but the Bureau held that it included obsolescence. That remained in the statute, and it was passed a second time. Then they passed another statute, and left out the word "depreciation" and they used instead "exhaustion" by use, and the Bureau held that that apparently showed a change in view, and that they evidently did not want to allow obsolescence, so they ceased permitting it.

That was the state of affairs when Congress came to consider the 1918 Act, and they wanted to put back the word "depreciation" in conference, because in interpreting that word, the Bureau had said that the taxpayer was not entitled to obsolescence. It was clear that they wanted the taxpayer to have obsolescence the same as the other allowance. When that came to a conference there was a disagreement about it, and they were fearful that by the use of the words "exhaustion, wear and tear" they would [fol. 79] again exclude "obsolescence", so they took the precaution to make sure of it, that the allowance would be granted, and so they put in "exhaustion, wear and tear", and then added "including an allowance for obsolescence". So that Congress made it perfectly certain that they wanted the taxpayer to have this deduction, and, of course, it has been allowed. It could not be denied. It has never been denied in principle at any time. It is only a question of whether or not it was broad enough to cover the loss of intangibles.

Of course, they held that it did cover a character of intangibles such as patents and copyrights. They said that was an exhaustible asset, although it was intangible. Therefore, they do not fight with us about the right to obsolescence of an intangible asset. They only fight with us about the loss of an intangible asset called "good will". So you see that they have attempted to find a restriction here, or to restrict the meaning of this statute to one character of asset, where there is not a word of limitation in the statute—not the slightest indication that Congress intended to deny to the taxpayer the loss in the value of its intangibles, the same as in its tangibles; because it was so easy to say so, if they had intended that. They knew what this situation was, better than anybody else. They knew that the brewers were on the threshold of destruction, and it is perfectly apparent to me that they were going to try to recompense them, to this extent; that they would not have to pay a tax on income without recouping at all the loss they were going to sustain in their capital. I think that is entirely sound and reasonable. I would hate to attribute to Congress an intent to destroy those assets, or [fol. 80] even to deny a deduction for their loss in computing an income tax. That would be adding insult to injury.

The Court: You have mentioned patents. Suppose you had a patent on a thing for which there was a popular demand, and when but half the life of that patent had run, that demand ceased, would there be obsolescence?

Mr. Hyman: No.

The Court: There has been just an exhaustion?

Mr. Hyman: Yes, that is all.

The Court: If, for instance, the art had so developed that the demand for that thing was very much less than it had been, would you say that the patent had suffered obsolescence?

Mr. Hyman: That it was becoming obsolete. Its useful life was not going to last the 17 years that the Government protected it.

The Court: All right. Now, applying that same principle to the words "good will" here, in the use of the word "obsolescence", the good will is not existent at all, it has become obsolete?

Mr. Hyman: It seems to me that it fits precisely with your Honor's illustration. In what respect does it differ from the patent which is, after all, just an intangible right which one has for a number of years?

The Court: In the case of the patent the right remains just the same, but it is of less value. In the case of good will, the good will has disappeared. It is not of less value; it is not of less use. It is simply non-existent. Now, would not that mean that you were giving the word "obsolescence" an entirely new meaning?

Mr. Hyman: I do not see that.

[fol. 81] The Court: An entirely different meaning that it never had before?

Mr. Hyman: I do not see that, your Honor, because it seems to me that the two are alike; that both of them are intangible assets. Let us assume that your patent was one which involved the manufacture of some article necessary in the brewing of beer, and that the patent, which was taken out two years before, would have seventeen years of life, which would leave fifteen years of life when prohibition went into effect. Now, that fifteen years of life, which we will say represents a value of $100,000, has got to be exhausted in the two-year period. The Bureau recognizes that. There is not any doubt about that, that the obsolescence period has got to take up the actual loss in the value

of that patent, which, of course, has got to be demonstrated by evidence. Wherein does that intangible differ from this one?

The Court: In this respect: In the case of a patent the right remains just as secure after 1920 as before.

Mr. Hyman: But it is of no value.

The Court: It is of less value. It might be of some value, but it is of very much less value. In the case of good will, the good will is gone, and there is no such thing after 1920. It has not become obsolete, it has not become of less use. It is completely exhausted.

Mr. Hyman: Whose property was it before?

The Court: Oh, it was the plaintiff's property.

Mr. Hyman: Yes, and whose was it when the beginning of the obsolescence period began?

The Court: The plaintiff's.

[fol. 82] Mr. Hyman: And it remains so to this day, except that it is no good to him.

The Court: Is not that the very essence of this question? Is there such a thing as good will——

Mr. Hyman (interposing): Nobody else has a right to it.

The Court: But it is non-existent.

Mr. Hyman: In what sense?

The Court: In the sense that nobody has it, either rightfully or wrongfully. It is non-existent; the trade is gone.

Mr. Hyman: It seems to me that you confuse the tangible with the intangible. Your patent was nothing but a right to use something.

The Court: It was just as much after it became obsolete as it was before; that is, just as much, so far as the right was concerned. It had much less value, it had much less use, but the man's rights to that patent remained exactly the same in his relation to the rest of the world. It was not out of existence at all.

Mr. Hyman: Suppose that you had filed a trade name, and thus had secured some measure of protection in that way, would you say that differed from the example of a patent? Would that make the right any better than it was before? After all, the patent merely is evidence of a certain right to an intangible thing, which nobody else can interfere with. Good will is the same thing. Our trade is that sort of tangible or intangible thing which nobody but us is entitled to receive or to enjoy.

The Court: The only trouble is that it is not a question of who is entitled to it. The question is whether it exists at all.

[fol. 83] Mr. Hyman: We would suffer the same loss with a patent.

The Court: No. The patent would remain, would it not?

Mr. Hyman: Yes.

The Court: After a change of demand.

Mr. Hyman: Yes.

The Court: It would remain in existence, and you could prevent an infringement just the same. It would have no practical value, but it would remain. Now, in the case of your good will, it is not existent at all.

Mr. Hyman: But it is not the patent that makes the value. It is the inventor's genius that made the value, which was purely intangible.

The Court: That is metaphysical distinction.

Mr. Hyman: Is it not like a share of stock in a corporation? It is merely evidence of a man's right to participate in the corporate assets.

The Court: Well, we will go to lunch now, and come back at 2:20.

The Court: I think I understand the issue. I think you might as well go ahead now with your proof.

Mr. Hyman: There was one other thing to which I did not call your Honor's attention. There is a third issue involved in the payment of additional tax for 1918, which was paid under protest in 1924, that it was barred by the Statute of Limitations at the time it was collected, and therefore, is refundable regardless of the determination of the other issues.

[fol. 84] JACOB LOEWER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hyman:

Mr. Hyman: I desire first to offer in evidence the stipulation between the attorneys for the respective parties, and I ask that it be marked Plaintiff's Exhibit No. 1.

(Paper marked Plaintiff's Exhibit No. 1.)

Mr. Hyman: I wonder if you want me to read that first?

The Court: I do not think it is necessary.

Mr. Hyman: No, I do not think so. It merely, in substance, states what the allowances were, how the assessments were arrived at, and what the allowances were that were made, and that no allowances for obsolescence have been granted.

I also desire to offer in evidence the various claims for refund which were filed.

I offer in evidence as Plaintiff's Exhibit No. 2, which, with your Honor's permission, we will substitute for photostats, as far as possible——

The Court: Yes.

Mr. Feldman: This group of claims for refund includes one or two, I am not sure which——

Mr. Hyman (interposing): Two.

Mr. Feldman: Two claims for refund that were filed by the taxpayer subsequent to the commencement of this action. In our answer we accepted an amended complaint [fol. 85] subsequent to the commencement of this action, setting out those new claims for refund, and setting out that they have not been passed upon by the Bureau although six months have elapsed since they were filed. I believe we have a valid defense to the introduction of those claims, on the ground that they were filed subsequent to the action. I want to object to their introduction, with the privilege of withdrawing that objection if I find, on an investigation of the law, that the plaintiff could commence a new action if the issue raised by these claims for refund is rejected here. In other words, I mean if they could at any rate start a new action, if the issues raised by these claims for refund were rejected by this Court, I do not want to raise a technical objection, and I had just as soon have the issue tried out here.

The Court: All right. You can make your objection and I will reserve decision on it now, and if at any subsequent time you want to withdraw the objection, you may do so. Otherwise, I will pass upon it as a matter of law, depending upon whether this is a valid objection or not. I note now an exception in favor of either party against whom I ultimately rule on that point.

(Papers marked Plaintiff's Exhibit No. 2.)

Mr. Hyman: Exhibit No. 2 consists of six claims and amended claims for refund, three of which apply to 1918, and three to 1919.

[fol. 86] I should like, for the sake of continuity—it may become important afterwards—to offer in evidence the letters of the Deputy Commissioner, dated January 11th, 1923; March 3rd, 1924; and May 6th, 1924, which constitute the determination of the Department.

Mr. Feldman: No objection. Well, your Honor, I simply want to object for the reason that I do not know whether this letter of January 11th, 1923, as forwarded to the taxpayer, had attached to it all of the letters that I have attached to the photostat, which was submitted to me by the Department. I would like to have the entire letter go in evidence. If not, if I may offer it in evidence, if the plaintiff does not want to, I would like to offer it now, so that I will not have to think about it later.

Mr. Hyman: The Revenue Agent's report was certainly not attached to the report of January 11th. There was a statement of liability attached, showing how they arrived at the figures, and this is it (exhibiting). Now, apparently that is the only thing that we have with a letter of March 11th, and if there had been anything else, I certainly would have it in the file. These are probably just office records—memoranda showing how they worked the figures out, and I have no idea what is in them.

Mr. Feldman: You have never seen these?

Mr. Hyman: I will not say that. It is a long time since 1923.

[fol. 87] Mr. Feldman: It is customary to send the agent's report to the taxpayer.

Mr. Hyman: It was customary for certain years. It was not always done.

(Papers marked respectively Plaintiff's Exhibits Nos. 3, 4 and 5.)

Mr. Hyman: I desire to offer in evidence the receipts of the Collector for the payments of additional taxes for 1918 and 1919, and I would like to have either the original of this letter or permission to put the copy in (exhibiting paper).

Mr. Feldman: No objection.

(Papers marked respectively Plaintiff's Exhibits Nos. 6 and 7.)

Mr. Hyman: Have you the letter there, Mr. Feldman, of March 23rd, 1927?

Mr. Feldman: What was it about?

Mr. Hyman: That was the letter enclosing the final claims for refund. Here is a copy of it (exhibiting).

Mr. Feldman: All right. I make the same objection to this letter as I made to the introduction of the claims for refund made subsequent to the commencement of this action.

The Court: All right. Same disposition.

(Paper marked Plaintiff's Exhibit No. 8.)

Mr. Hyman: There is no objection, is there, to stipulating that more than six months have elapsed since the filing of the final claims for refund?

Mr. Feldman: I do not know. If you say so——

[fol. 88] Mr. Hyman (interposing): I will take an oath to it, if you want me.

Mr. Feldman: No. That is all right.

Mr. Hyman: Then, it is admitted that more than six months have elapsed since the filing of the final claims for refund, and that there has been no action by the Commissioner on those claims.

Mr. Feldman: Of course, I enter into that stipulation subject to the same objection.

The Court: Yes. Same disposition.

By Mr. Hyman:

Q. Mr. Loewer, you are the president of V. Loewer's Gambrinus Brewery Company, the plaintiff in this action?

A. I am.

Q. And how long have you been connected with that company?

A. Forty years.

Q. And how long have you been an officer of it?

A. Forty years.

Q. Will you tell us what business the company was in, and when it was established, and in general describe its character?

A. It was established——

Q. (Continuing:) Up until 1920?

A. It was established in 1879 for the manufacture and sale of lager beer, ales and porter, up to and including the time of the prohibition amendment.

Q. Now, tell the Court, if you please, how that company conducted its business, so far as building up a trade for its products is concerned.

A. We had our solicitors out to get trade, to get a saloon on a corner or in a side street, and we generally furnished the licensee or holder of the place with the amount of [fol. 89] money to put the fixtures in, and took a chattel mortgage on them, and we would also advance the liquor tax certificate money, and we usually would take a mortgage on the lease, or sometimes would buy the property so as to control the trade,—and he would sell our beer exclusively.

Q. Where you did not actually buy the property, was your rule invariably to cover your advancements by a mortgage on the leasehold, on the chattels, and an assignment of the liquor tax certificates?

A. All three, yes, sir.

Q. Was there any association in the City of New York composed of the brewers in the Metropolitan District?

A. Yes, sir, The Lager Beer Brewers Board of Trade.

Q. And what sort of institution was that?

A. Where each brewer recorded the amount of indebtedness owing to the brewery by the saloonkeeper, and we had about 98 or 99 per cent. of the brewers in this organization in New York and vicinity, and if another brewer wanted to take a customer——

Q. (Interposing.) Let me interrupt you for a moment. When you say 98 or 99 per cent. of the brewers in the vicinity of Greater New York, what territory do you include?

A. 98 or 99 per cent. of the brewers in Greater New York and the vicinity, including as far as the Oranges, Newark, and out on Long Island, and up in Westchester as far as Peekskill.

Q. Besides having a place where you could register your connection with these various places, where your beer was sold, and to show the amount of indebtedness and the mortgages and so forth on the place, what other purpose, [fol. 90] if any, did this association serve?

A. We filed all our claims against each individual with the clerk of the association.

Q. I mean did your association have any other activities? Did you hold meetings?

A. We held regular monthly meetings, yes.

Q. Was your association in a sense a brewers' protective association?

A. Yes, a protective association.

Q. And did this association concern itself with legislation?

A. Yes, sir.

Q. Both local and national legislation?

A. Local and national.

Q. And did it do other things for the protection of the industry?

A. Yes, sir, it took care of all matters of that kind.

Q. How active were you in that association?

A. Well, I was not an officer. I was an officer in another smaller association, that handled labor matters, and I was put on various committees of the Lager Beer Brewers' Board of Trade.

Q. You were an officer of this other association?

A. The Union Brewers' Association; I was president of it.

Q. That was also composed of local brewers?

A. Of local brewers in New York City and vicinity, to take care of labor matters exclusively.

Q. Beginning with 1905, and coming down to the end of 1917, tell us what the average total output of beer, ales and porter was in your plant?

A. I think the average was around—a little amount below 100,000 barrels per annum.

Q. And how much below 100,000 barrels was it? Was it 98,000 or 99,000 barrels?

A. 98,000 or 99,000 barrels.

[fol. 91] Q. It was not under 98,000?

A. No, I don't believe so.

Q. And in some of those years did it run very considerably over 100,000 barrels?

A. Yes, in 1906, for instance, I think we ran up to 124,000 barrels.

Mr. Feldman: May I object to this line of testimony, for the reason that it does not in any way tend to prove

the value of the good will, which I presume it is intended to prove?

The Court: I understand he is just laying a foundation.

Mr. Hyman: Yes.

Mr. Feldman: I cannot understand, unless he proves profits, how that can prove the value of any good will.

The Court: I will take the testimony, with an exception to the defendant.

Mr. Hyman: I have not any intention of proving anything about profits, if your Honor please.

By Mr. Hyman:

Q. I show you a book, which was printed on appeal, which you verified and presented to the Bureau of Internal Revenue in connection with this case, and I ask you to look at Schedule 18 on page 30, and see if that refreshes your memory concerning your output (handing book to the witness)?

A. Yes, sir, it does.

Q. Did you make up those figures yourself?

A. I did.

[fol. 92] Q. And are they accurate?

A. Taken from the revenue books.

Q. The revenue books?

A. Yes.

Q. You mean the books where you put the stamp tax——

A. (Interposing.) Yes.

Q. —on the barrels?

A. Yes.

Mr. Hyman: I offer that schedule in evidence.

Mr. Feldman: No objection.

(Paper marked Plaintiff's Exhibit No. 9.)

Q. This trade which you spoke of a while ago, was that the trade that consumed the annual output which you have just testified to?

A. In packages, yes, sir.

Q. Did you have a bottling department during all this period?

A. We started in 1911 with a bottling department, yes.

Q. How important a unit was that bottling department?

A. We produced about 5 or 10 per cent. of our gross output in bottles.

Q. That is to say, you bottled——

A. (Interposing.) We bottled about 5 to 10 per cent. of our gross output.

Q. That was after 1911?

A. Yes.

Q. But prior to that time your output was all in casks and barrels?

A. All in wood—in packages.

Q. In wood?

A. Yes.

Q. Approximately how many customers consumed this average output?

A. Of draft beer, you mean, in packages?

Q. Yes, give it that way, first.

A. I would say about 100.

Q. Afterwards did that 100 include those who were tak- [fol. 93] ing some bottled beer from the bottling unit that you established?

A. I didn't get that question.

Q. (Question read.) A. No; those are only what we called saloon keepers, and very rarely did they use bottled beer. Grocery stores and delicatessen stores the bottled beer was delivered to, and to homes.

Q. Where was the plant of this company located from 1905 on?

A. From 1905 the brewery was on the north side of 41st street——

Q. (Interposing.) Give us the approximate location?

A. 41st Street betwe-n 10th and 11th Avenues.

Q. In New York City?

A. In New York City, yes, between 41st and 42nd Streets, and the bottling unit was from 40th to 41st Streets between the same avenues.

Q. Now, could you tell his Honor generally, or describe generally the buildings in which your operations were carried on, excluding your office, which is of no importance in this case, and your stable?

A. (The witness produced a paper.) The brewery proper on the north side of West 41st Street consists of four ice-houses on the westerly side of our property each 25 by 100 feet, making storage capacity of 100 by 100. Easterly of that we have what we call the brew house, which is 50 feet by 100 in the front, and goes down to 25

feet in the rear, so that the boiler house next to that takes up part of the two lots, and then we have one other parcel, the extreme end, another 25-foot lot, which is our engine room, pump room, and cooper shop, and used for the storage of kegs and packages. That comprises seven city lots altogether on 41st Street for the manufacture and sale [fol. 94] of draft beer.

Q. I want to ask you if these buildings, which you have described to the Court, were built expressly for the brewing of beer, ales and other malt liquors?

A. Yes, sir.

Mr. Feldman: I object to that unless the witness first testifies that he built them or had them built.

Mr. Hyman: He has been a brewer for forty years, your Honor.

The Court: The objection is sustained, with an exception to the plaintiff. Strike out the answer.

Q. I do not suppose you saw them built, did you?

A. I did.

Q. Were you active in the affairs of the company at that time?

A. I was.

Q. Did you assist in laying out the plans for the erection of the plant?

A. I laid out each one of these buildings from 1901, when my father took sick.

Mr. Hyman: Now, your Honor, may we have that question answered?

The Court: Yes.

Mr. Hyman: Will you read the question, please?

(Question read, as follows:)

"Q. I want to ask you if these buildings, which you have described to the Court, were built expressly for the brewing of beer, ales and other malt liquors?"

The Witness: Yes, sir.

[fol. 95] Q. Will you state what the problems are in regard to the building of buildings for the purposes for which these were constructed, which distinguishes them from any ordinary building operation?

A. They were put up at four different periods, from 1888 until 1906, and in 1888 the brewing industry required

vats and tanks of a certain height, length or width, that as each additional unit was erected after that, you could not put it up so as to have the floor levels meet the old floor levels, and the business increasing——

Mr. Feldman (interposing): May I interrupt for a moment?

The Witness: Yes.

Mr. Feldman: What are you reading from?

The Witness: Just a sketch of the icehouses, and when they were built.

Mr. Feldman: All right.

Q. Go ahead.

A. And as the sale of beer increased in the United States, and particularly in the east, we had larger units or larger tanks put in, so that in 1879, for instance, when we had a 50-barrel tank—chip-vat as we call it—in fifteen or twenty years later we had them of 200 or 300-barrel capacity, thereby making each floor of each house run irregularly, with no uniformity. Now, that relates to the four icehouses on the westerly side of the property or storage warehouse. Now, the brew house is built with mezzanine floors, so that when we start the operation of the brewing of beer, the water, malt grain, corn or any other material—hops and so forth—go from their own levels from [fol. 96] one floor to another, graduated. They go from the cookers' and mashers' into the mash tubes, and from the mash tubs into the kettle, and then it is pumped on the roof to flow automatically over the beer coolers on the top floor, and thence into the fermenting room of the storage warehouses, where it again gravitates down to the lower floors, when it is finished. This necessitated for the brew house, in particular, mezzanine floors of for instance —the brew house is this side, and the mash tub is up on the half elevation, and the brew kettles go from this floor into the next one below.

Now, our boiler room and ice-machine and condenser room is built likewise. While it is only three stories in height, yet each story is two stories in height of an average building.

Q. Now, were these various buildings laid out to meet the necessities of the indusry such as you have just described?

A. I did not quite get your question.

Q. You described the different processes and explained these various floors and mezzanine balconies, and all that through the plant. I want to know if they are necessitated in the construction of the building by the character of your industry?

A. Positively.

Q. That is all I wanted to have clear.

A. Oh, yes.

Mr. Hyman: I will identify these photographs first (handing photographs to Mr. Feldman). I think these will aid the Court in the determination of the character of the buildings, and with regard to their construction, and will perhaps aid the witness also.

[fol. 97] The Witness: They are the interiors of the different floors.

Mr. Feldman: All the interiors?

The Witness: No, not all of them.

Mr. Feldman: Then, I object to these for a reason that they only show a part of the story. I object to them as incompetent, irrelevant and immaterial. I waive, however, the ground that the photographer is not here who took them. I do not raise that objection.

The Court: The objection is overruled, with the exception to the defendant.

(Photographs marked collectively Plaintiff's Exhibit No. 10.)

The Court: How much of the building do you want photographed?

Mr. Feldman: There are certain parts of these buildings that are being used. We do not know whether they are in here or not.

Mr. Hyman: We will tell you all about that.

The Court: They are at liberty to introduce whatever they want in the way of evidence. If they do not make out a case, that is their lookout, but that is not a ground for your objecting to this now.

By Mr. Hyman:

Q. I show you this Plaintiff's Exhibit No. 10, these photographs, and I wish you would have reference to that,

Mr. Loewer, and taking them one after another, just explain to the Court what those photographs show (handing photographs to the witness)?

[fol. 98] A. This is the first floor of the brew house, which was formerly used as a wash house for washing beer barrels. It is about 24 or 25 feet high, and the right hand corner shows the second story of the boiler room.

Q. Just show it to the Court.

A. Yes; and the brew kettles are on the next floor above that one, also about 25 or 26 feet high. That is the ground floor of the brew house (indicating).

Now, the second picture gives the rear of the brew house, where it terminates into 25 feet.

Q. Just explain something more about that, if you will, as you go along. If there are any peculiarities in the construction or anything of that sort——

A. (Interposing.) Yes. This part of the brew house had to be particularly built with additional strength, because in this end of the 25 feet of that 50 foot lot at the rear, we have two storage tanks made of three quarter inch iron, one holding 12,000 bushels of malt, and the other holding three carloads of corn.

Q. Three what?

A. Three carloads of corn, which we formerly used in the manufacture of good beer or high power beer. They run from the second story through to the roof. They run through four stories, approximately, I think; almost between 40 and 50 feet in height; and about 25 to 27 feet in diameter.

Q. Will you continue, please?

A. Yes. The next picture shows the first floor of the easterly lot, which was exclusively used as a hoop-driving department for the kegs, and now it is used for storage of electric wagons.

The fourth picture is the fourth floor of the brew house, showing a large copper water tank and the malt weighing machine.

[fol. 99] The fifth picture is the third floor of the brew house, showing a corn-cooker and two water tanks, which supply the two mash tubs and the two brew kettles on the floors below.

The next or sixth picture shows the construction of the first floor of the brew house, with the mezzanine floors in

the rear, upon which stand the two mash tubs, and you can see the part of the one brew kettle in the front of the building on the right hand corner. The other one is on the other side, but cannot be seen from this picture. This is one of the floors that I described as about 24 or 25 feet in height.

The next picture shows the opposite view of the same floor that I just described, showing the two brew kettles on the floor. The following picture shows the 220-ton ice-machine, and in the rear of it an 80-ton machine, and to the left the opening which is a large lower floor, and is what we call the pump room, the ice-machine floor being above 24 feet in height.

The picture following that shows a floor of about 12 feet in height, and the cylinder part of the large ice machine, which goes into the next building of double its height, with different pumps.

The following picture shows one of our chip casks of about 200 barrels capacity, with 7 tanks for gathering carbonic gas. And these four ice-houses were all filled with tanks of this description, except that some were—the fermenting tanks were an upright tank about 9 feet high; the storage tanks ran as high as 24 feet in height, and these ran all the way up, about 10 or 10½ feet in height.

The last picture shows one of these chip cask cellars, with the ice-machine disc hanging on the pipes for refrig- [fol. 100] eration, and all told we had 21 of these cellars prior to the advent of prohibition, with cooperage of this description.

Q. Do you recall what type of construction was used in these various buildings?

A. All brick, iron columns and girders and beams, cement arches, and the only part that was of wood was the roof.

The Court: You still use those same buildings in the brewing of beer, do you?

The Witness: No, sir.

The Court: What do you use them for?

The Witness: A part of them.

The Court: Which ones do you still use?

The Witness: I use portions of the two westerly ones, about one-third of what we formerly used.

By Mr. Hyman:

Q. You abandoned, did you not, a part of your machinery and equipment when you quit manufacturing beer of more than one-half of one per cent.?

A. Yes, sir.

Q. Now, the Bureau of Internal Revenue has allowed you the deduction which you claimed in connection with that machinery and equipment, have they not?

A. Yes, sir.

Q. You have told his Honor that you also discontinued, in so far as it was possible, the use of the buildings, and now use only a portion of them?

A. Yes, sir.

Q. I think his Honor would like to have a somewhat more detailed explanation of that. Suppose you start with the cooperage problem. How many, approximately, barrels [fol. 101] and casks did you use in the production of beer before prohibition?

A. You mean the rolling stock?

Q. Yes. I do not mean the big vats?

A. The rolling stock.

Q. Yes.

A. We probably had anywhere between 12,000 and 15,000 packages—half barrels, quarters, sixths, and hogsheads, and barrels, but at the present time ——

Q. (Interposing.) No, not at the present time, but after you had quit manufacturing beer, and went into the business of manufacturing non-intoxicating cereal beverage ——

A. (Interposing.) We got so many of the empties back that we were either forced to store them and let them dry, or sell them—and we sold most of them.

Q. Now, after the advent of prohibition you ceased the manufacture of beer?

A. Yes, sir.

Q. And what happened to your barrel trade?

A. The barrel trade vanished. The saloons closed one after another, and we were getting our packages back, and we had to sell them. We could not store them.

Q. You were using portions of your buildings in this process?

A. Yes, sir, of course.

Q. Tell the Court what you did with the cooperage in these brewery buildings?

A. In 1921 we demolished half a dozen cellars. We call them "cellars". They are floors of these four buildings—and we took them out, as we did not need them, and put other goods in there to store after 1921.

Q. What I mean is these barrels and half barrels and quarters and sixths, that you were talking about—these 15,000 packages.

A. Yes.

Q. How did they figure in your activities before prohibition? You put your beer into them, did you not?

[fol. 102] A. Oh, yes, we sold our beer to the saloons in them.

Q. And when they came back, what did you do with the barrels before you put more beer into them?

A. You mean while we were selling good beer?

Q. Yes.

A. We kept on washing them and filling them and sending them out continuously.

Q. And you had a portion of your plant devoted to that operation, did you not?

A. Yes, the large wash-room that I spoke about, on the first floor of the brew house, 50 by 100 feet. We washed approximately 1500 to 2000 packages per day.

Q. And after prohibition, say, in 1921, how many packages did you have to wash?

A. About 50 a week—50 to 100 a week.

Q. At this present time have you any increase in the barrelage—the use of barrels?

A. The barrel—the keg beer business or barrel beer business has gone, so that I don't think we own more than 250 to 500 packages.

Q. And how many do you use?

A. If we use 50 a week it is a good week.

Q. You continue to speak of "packages". Mr. Feldman wants to know what you mean by that?

A. Small cooperate—barrels, half-barrels, quarters and sixths.

Q. You call all of them "packages"?

A. Yes. The others we call vats and tanks—the large stationary cooperage.

Q. Now, then, tell us some more about the discontinuance of the use of these buildings, Mr. Loewer?

A. Well, we used all of these cellars in their four respective ice-houses, with the exception of three which we

[fol. 103] never had put any large stationary cooperage in up to 1919. Then, with the advent of prohibition, we used about one-third of the entire storage capacity of those four houses—those storage houses. We waited until 1920 or 1921 for a decision of the United States Supreme Court on the validity of the 18th Amendment, and when that was adverse to us, we demolished ten or twelve different cellars of their cooperage and used those cellars for other purposes after 1921, not having any use for them on account of the near-beer.

Q. Now, of your output I think you told us that before prohibition from 90 to 95 per cent. was in barrels, half-barrels, quarters and sixths?

A. Yes, sir.

Q. And the small remainder was in bottled beer?

A. In bottled beer sold to grocery stores, delicatessens and families.

Q. You had no control over that type of trade then?

A. No, and we have not today.

The Court: What do you mean when you say you had no control over it?

The Witness: Well, I cannot say "That customer is mine and must buy my beer." Each store can buy half a dozen different kinds of beer.

Mr. Hyman: That is, they have not this chattel mortgage and leasehold control any more. That went with prohibition, when the trade was destroyed.

By Mr. Hyman:

Q. Now, when did you quit the brewing of beer?

A. October, I believe, 1919, when the law went into effect. [fol. 104] Q. Was it the 28th of October, 1919?

A. The end of October, yes.

The Court: And since then you have brewed near beer, have you not?

The Witness: Yes, sir.

The Court: In the same plant?

The Witness: Yes, sir.

By Mr. Hyman:

Q. Your operations were carried on by the equipment which you have told his Honor was contained in those buildings?

A. Yes, sir.

Q. And they were in units, were they not?

A. All in double units, yes, sir.

Q. Now, just explain that, please.

A. Well, we had double hot-water tanks, a double milling system, grinding, double mash tubs, double ice-machines, duplex or double, double kettles, four boilers, double system of dynamos; in fact, everything was in duplicate and triplicate, which we used daily.

Q. Now, what do you do, or what did you do, after you ceased the manufacture of beer, and started to manufacture near beer?

A. We used one unit possibly three times a week.

Q. So far as your output was concerned—that is, the V. Loewer's Gambrinus Brewery Company—what relation did the production and sale of this new product have to the amount of your sales of beer before prohibition?

A. About one-fifth.

The Court: You mean you make one-fifth as much near beer as you formerly made of regular beer?

[fol. 105] The Witness: We make about one-fifth as much as we did of beer.

Q. So the average output of your brewery is about 20,000 barrels?

A. Between fifteen thousand and twenty thousand barrels today, as against a hundred thousand barrels before that time.

The Court: The near beer sells for a higher price, does it not?

The Witness: No, for a lower price, and it is boiled twice, and cooled off twice, unfortunately. It costs more to make it.

The Court: Do you sell it for more?

The Witness: We would like to, but we can not.

The Court: The real beer was five cents per bottle?

The Witness: Yes, sir.

The Court: You can not get near beer for that, can you?

The Witness: That is one of the reasons we are suffering. They are retailing it at too high a price.

The Court: If anyone wanted to set up a plant for the manufacture of near beer, he would have to have the sort of plant that you have, would he not?

The Witness: Oh, no. I could put up a plant to turn out twice again what I am turning out now on a little less than between one-third and one-half of what I have now. On three lots I would build a plant complete to turn out from seventy-five thousand to eighty thousand barrels of [fol. 106] near beer, on three lots, where we are using seven now.

The Court: Just tell me why you can not use those——

The Witness (interposing): Near beer, in the first place, becomes fit for use within six or seven weeks after it is manufactured. The real beer before Prohibition had to be stored from three to three and a half months. We used to carry 24,000 barrels of finished product in our ice houses. If we carry now seven or eight hundred, it is a lot of near beer, on account of its age. Near beer does not need to be aged, but real beer did.

The Court: And what further difference is there?

The Witness: Well, I would not need the refrigeration that I have got. I would not need the four boilers that I have got. I would not need the double cookers. I have my big beer cooler, which is about twenty-five feet high. I have got to have that in the same space, half the size of this room, whether I cool fifty barrels a day or 500 barrels of beer a day. If I were building a new brew house for present conditions, I would build one in about one-fifth of this space.

The Court: But using the same type of machinery?

The Witness: Oh, yes; everything else being equal. We do the same with the ice machines. We could get along with two boilers, instead of four, which we have there now. We change off, of course.

[fol. 107] Q. Just tell his Honor about the kettles, too.

A. I have two kettles, one of 350 barrels, and one of 150 barrels. If I brewed the one of 150 barrels a day, I would make more beer in three hundred working days than twice what we are selling today. Whereas, with real beer in warm weather we had to brew 500 barrels a day. The same applies to the mash tubs, and everything else in the entire plant.

Q. Does the same apply to your building?

A. Why, naturally; yes, they are idle. The four ice houses are two-thirds idle.

Q. And your wash house?

A. And the wash house is used today for storage of electric cars.

Q. The safe which was devoted to these units, which you do not now need, is that also wasted space?

A. Naturally it is wasted, when I do not need it, and have not any use for it. The buildings are of such peculiar construction, as I said in the beginning, that the beer in the process of manufacture went from one floor to the other floor automatically, and you could not lay out those four buildings to harmonize any floor space or any height.

Q. Your levels are all irregular?

A. Yes, they are all anywhere between two and five feet out of level, up and down.

Q. And how about the height of the ceilings?

A. The heights are altogether different.

The Court: Is that true of brewery buildings generally throughout the country?

The Witness: Yes, it is, as far as I have seen—and I have seen a great many.

The Court: What are they going to do with those things? [fol. 108] Are they waiting for a change?

The Witness: I can only tell you that in New York and vicinity there is only one thing to do—to rip them right down. If you can use the walls, you might do that. The Stevenson Building, for instance, was demolished entirely, at Tenth Avenue and 39th Street. They tore their whole plant down, because they could not do anything with it. It is of such peculiar construction, all irregular lines, with these different mezzanines. Some of our cellars are easily as high as this room—perhaps not quite as high. In 1922 or 1923 we put in two floors—we put two extra floors in two of the large cellars, which were approximately twenty-four feet high, for other purposes than the storage of near beer.

The Court: Do other brewers make about one-fifth of what their output used to be before Prohibition?

The Witness: Yes, your Honor, unless the sales—well, for instance, the last year before Prohibition we sold sixty-five million barrels of beer in the United States, and I think that last year it was four million barrels of near beer. That is the percentage or proportion of the two.

By Mr. Hyman:

Q. Now, you have described, Mr. Loewer, generally, to his Honor, about what portion of your plant would be needed to carry on the business that you are now and have [fol. 109] been carrying on since Prohibition?

A. Yes.

Q. As a matter of fact, have you made any investigation to see if these buildings could be put to any other commercial use?

A. I certainly did in the two years that intervened between the Prohibition Act going into force and when we started to demolish the large cooperage in those cellars. I have investigated dry-wash and wet-wash laundries, and the candy business, and dozens of others, until the board of directors finally decided that the most adaptability for those cellars would be cold storage.

Q. Well, have you used a portion of them in that way?

A. I started in 1918, because I had three cellars that were not equipped with any large cooperage, and I wanted to see how the business went before I made any investment, and we leased them to Joseph Stern and to the New York Butchers, because we accumulated a lot of lard, which, throughout the war, had been in demand on the other side, and naturally they had to store it, and we got $250 or $300 per floor per month; and then when we lost our appeal to the United States Supreme Court, I then said, "We will take out so many cellars and go into the cold storage business, and remove the pipes from the ceilings, and put them on the side walls," and we used about two-thirds to three-quarters of those ice houses, and are using them today for cold storage purposes other than beer.

Q. Now, upon investigation, you say you found that was the only thing you could adapt those buildings for?

A. Yes.

[fol. 110] Q. And you organized a cold storage company?

A. Yes.

Q. And has that been successful?

A. No.

Q. Did you lose money in its operation?

A. Each year; yes.

Q. Now, what else did you do in order to keep this plant in operation, to manufacture near beer? You could not

have continued to manufacture near beer alone, could you, in that plant?

A. No, sir. I enlisted other brewers to come over and join me, and I would manufacture the beer on a per barrel basis.

Q. And how much do they pay you above the cost of manufacturing?

A. Two cents per case, and twenty-five cents per barrel.

Q. So that for manufacturing a barrel of near beer you get twenty-five cents, do you?

A. Profit from the other brewers, but it reduced our costs—our overheads and manufacturing costs.

Q. Now, how much do you manufacture for other people?

A. For what period, Mr. Hyman?

Q. Well, let me see.

A. 1918?

Q. No. Just wait a minute. You stopped brewing beer in 1919, did you not?

A. Yes.

Q. Well, beginning then, how much of near beer that you were turning out was your own?

A. In 1919 the Stevenson Brewery joined with us in the manufacture, and we almost both sold alike. Our output then was about half ours and the other half theirs.

Q. And did you get someone else to come over afterwards?

A. Yes; I got the Munch Brewery.

Q. And you did the manufacturing for them?

A. Yes. When the three brewers came there, I think they came in 1920 or 1921; the Munch, and we were each [fol. 111] selling about between 30 and 35 per cent of the output. We were probably selling 35 or maybe 40 per cent of it—about one-third each.

Q. And what amount were you turning out from the beginning of the manufacture of near beer?

A. In barrels or boxes?

Q. I want it in both ways. First, just give us the total.

A. I would have to refresh my memory on that.

Q. You have some figures here on that?

A. Yes, in that sworn statement.

Q. See if this schedule No. 19 contains the figures that you are looking forward (handing paper to witness)?

A. In 1919 subsequent to October 28th, the output was 4,545 barrels, but in 1920—the fiscal Government year, I believe that is—39,000 barrels, and in 1921 it was 53,000 barrels, or an average of 44,668 barrels per year.

Q. Now, this barrelage which you have given of near beer, which runs from 39,000 up to around what is it—50,000 barrels—that is what you say comprised the output of three brewers?

A. Yes, the output of the three.

Q. And you had about 35 per cent of that total?

A. Yes, sir.

Q. That would be approximately 17,000 or 18,000 barrels?

A. Yes, approximately that; 17,000 or 18,000 barrels.

Q. Now then, prior to Prohibition, you said that practically all your output went out in barrels?

A. 90 per cent of it went out in packages.

Q. Now, then, after Prohibition, what happened?

A. It just reversed itself. About 90 per cent went out in bottles, and 10 per cent in packages—wooden packages, but today I don't think that half of one per cent of the output is in packages.

[fol. 112] Q. You say it is now, today, all in bottles?

A. Yes, today it is all bottled.

Q. Then, after Prohibition went into effect, did you have any of the 100 customers that you had prior to Prohibition? Did you have any of them buying this cereal beverage product, which is called "near bear"?

A. We might have had a few that we sold one or two halves to a week, to cover themselves, under the law, when they were buying the good stuff from some other brewer.

Q. When you say one or two halves a week, that is in distinction or contradistinction to what before?

A. 20 or 25 halves a week.

Q. And did that business all definitely drop off and discontinue?

A. I don't think we have half a dozen today; not more — six today.

Q. And what do they buy?

A. Nothing, practically; one or two halves a week.

Q. His Honor asked you a very pertinent question awhile ago about near beer being more expensive to purchase than

beer was before Prohibition. Is that true, so far as your sale of that product is concerned?

A. The price of near beer today is almost what regular beer was in 1915 or 1916.

Q. Well, the cost of production in 1915 and 1916 compared how with the present day costs of material and labor and so forth?

A. Well, labor was naturally cheaper, and material was cheaper, too. In fact, everything was cheaper in 1915 and 1916 compared with today.

Q. Yes.

A. Except some few labor-saving devices, which have been developed.

Q. Relatively would you say that it costs more to produce near beer than it did real beer before Prohibition?

A. Yes; I think it costs a little more now, on account of double boiling.

[fol. 113] Q. You were about to tell his Honor what you sell this cereal beverage for to the delicatessen stores and other places?

A. Today?

Q. Yes.

A. 90 cents, 95 cents or a dollar.

Q. That is for a case of twenty-four bottles?

A. Yes, a case of twenty-four bottles.

Mr. Hyman: You see, your Honor, where the discrepancy comes.

Q. Now, since your business is conducted through your bottling department entirely, does that account for the fact that so much of this plant that you had used prior to Prohibition is *of* no longer of any value to you?

A. Yes, sir.

Q. You have a separate bottling plant, have you not?

A. Yes, on the south side of 41st Street. We could not use any of the old buildings, so we had to take other buildings on the other side for that purpose.

Q. Now, Mr. Loewer, you told us that you had only about six customers left of those that you had before Prohibition, and that they practically take none of your output?

A. Very little.

Q. Prior to Prohibition was there a definite market for trade of the character you have described, of a brewery

that was putting out approximately a hundred thousand barrels a year to trade controlled in the manner you have mentioned?

A. There was.

Q. And when I speak of "trade," I want to ask you that same question with respect to the plant: Did you mean that there was a ready market for the sale of the trade, without the plant?

A. For the output, yes, sir.

[fol. 114] Q. Do you know of your own knowledge that sales of brewery trade took place in the Metropolitan District from time to time?

A. I do.

Q. How were those sales generally effected? What went with the trade?

A. A man bought the chattel mortgages that were on the place, and the difference was for the goodwill, for the amount of barrelage he bought.

Mr. Feldman: You mean the chattel mortgages on the saloons?

The Witness: Yes, sir.

Q. And did they pay for licenses on the place separately?

A. That was separate, yes, or if they wanted to buy the equipment, that was separate.

Q. They took over the mortgages on the leasehold or chattels, if you had both, and an assignment of the liquor tax certificates?

A. Yes.

Q. And a power of attorney?

A. Yes, sir.

Q. And did the value of trade of that kind vary in accordance with the size of the trade and the output?

A. A small brewery of, say, between 25 and 50 thousand barrels output in kegs, the price was about three dollars per barrel; and between 50,000 and 100,000 it was four dollars a barrel, and over 100,000 it ran as high as six and seven dollars a barrel—five, six and seven dollars a barrel.

Q. So that the larger the output or the trade, the greater was the price per barrel? Is that what you want us to understand?

A. Yes, sir.

Q. Will you explain why that was?

A. Well, in the first place, it brought down the purchasing brewers delivery cost very extensively, because he was [fol. 115] already delivering in that neighborhood, wherever this brewery happened to have most of its trade, and consequently it reduced his cost of operations tremendously in a month.

Q. I believe that you were once called upon to investigate that question of reduction in cost, is that right?

A. Yes.

Q. Could you give his Honor some idea of the amount of the reduction in the overhead cost—how it worked out?

A. When the Stevenson Brewery and the Loewer Brewery amalgamated for the purpose of brewing near beer, they had seventy-six employees and we had seventy-four employees. When we amalgamated, we had, I think, eighty-two employees operating the two breweries in one. Our breweries were only two blocks apart, so you can readily see every morning his trucks and our trucks went over the same territory, but after we had amalgamated our one truck would make deliveries for both at the same time.

Q. Now, I think you also figured out at one time the cost of the manufacture—how it was affected by increasing the barrelage output. Do you recall that?

A. Yes, sir.

Q. You showed that to me at one time?

A. Yes.

Q. I wish you would tell his Honor about that. I think that is very interesting.

A. You want the near beer period?

Q. I do not care. Have you got the beer period?

A. No.

Q. Then, give us the near beer period.

A. The cost of manufacturing month by month varies from $5.10 a barrel in the winter time or dull season, down to $1.58 in July a barrel.

[fol. 116] Q. That is what I wanted.

A. The bottling cost runs from 24 cents in February down to 12-1 10th cents in July of this year. The keg delivery, the worst we had was last month, October, and it was $6.69 a barrel to deliver a keg of near beer, and in July it was $2.33 a barrel.

Q. And in the old days, if you can give us an idea, when your trucks went out loaded every day, what the cost of delivery was then?

A. We figured the cost of manufacture and delivery in the old days together.

Q. Yes.

A. And we used a figure of somewhere around $1.00 or a little over $1.00 per barrel.

Q. For manufacture and delivery?

A. Mr. Nungasser, our auditor, perhaps knows that better than I do.

The Court: How big a barrel?

The Witness: 31 gallons, that is two half-barrels.

The Court: For manufacture and delivery?

The Witness: Yes, sir; in the old days. The men only got $18 a week at that time.

Q. And you said in October of this year it cost you what?

A. $6.69 to deliver a barrel.

(Adjourned to Wednesday, November 28th, 1928, at ten-thirty o'clock A. M.)

[fol. 117] New York, November 28, 1928.

Met pursuant to adjournment.

Same appearances as before.

Mr. Hyman: We are able, your Honor, to shorten up very considerably some of the testimony that would be necessary here, by both of us doing some conceding.

We have two alternative methods of figuring our loss here. The one which I am about to speak of now is purely an alternative method, and it would take the greater time to prove it, and Mr. Feldman has very kindly consented to stipulate that if the Court holds that we are entitled to an obsolescence on buildings, based on my alternative method of showing a part abandoned and a part continued, that the allowances shall be against income, for 1918 the sum of $21,482.50, above normal depreciation, and for 1919, $23,659.58 above normal depreciation. That will shorten it up.

The Court: Yes, that is very helpful.

Mr. Hyman: Yes, I think so.

The Court: On the other hand, will you further define what you mean by your alternative method?

Mr. Hyman: Yes. This I use as a secondary method. My actual method and the one that I thought legally must be applied is not the loss of value in the use of it, but actually the depreciated value—the loss of the depreciated [fol. 118] value of the buildings as an entirety, treating them as having no commercial value whatsoever.

The Court: Does that result in a larger figure?

Mr. Hyman: Yes, that method is very much larger. That is just a method that I am adopting, because, if I may explain it very frankly, when we were before the Bureau we scaled our figures to the bone, in the hope that they would grant the allowances, and that that would be the end of this trouble; but we had originally claimed, on this method, twice this figure. We scaled it down then to meet the suggestions in the conference, indicating that if we scaled it down to these figures, we might get by with it. Unfortunately, however, they did not allow anything on it afterwards, but the claims for refund that we filed claimed those figures, so I do not think I ought to go back on that method.

The Court: All right.

Mr. Feldman: If your Honor please, I want it understood that although we stipulate that these were the amounts for obsolescence to be allowed on the alternative spoken of by Mr. Hyman, we would like to have the testimony go in to the effect that there was no loss in useful value, although they do not have to prove, according to this stipulation, theamount of that loss.

Mr. Hyman: That is all right.

The Court: Yes.

[fol. 119] Jacob Loewer resumed the stand.

Direct examination continued.

By Mr. Hyman:

Q. Mr. Loewer, your schedule of barrelage output, which has been offered in evidence here, discloses some falling off in your output and sales in the last two or three years before Prohibition—a year or two anyway, according to my recollection. Will you explain to the Court what conditions existed that might account for that?

A. Through the war, when we entered into it, there was a tax increase—a war tax from one to six dollars a barrel, which would naturally diminish the sale of beer; and war time restrictions along the waterfront, zoning—all the places on Long Island in and around the camps, the entire Jersey, Hoboken waterfront was zoned. For instance, over there we had eight wagons running, and when the zoning went into effect we had only one making deliveries.

Q. Will you explain what you mean by "zoning"? For what purpose was this zoning?

A. A Presidential Proclamation that no liquor of any kind could be sold within a mile of any place of embarkation or debarkation of troops, any camp sites—I do not remember all of them, but it applied to a great many places.

Q. Were there any restrictions on the use of cereals?

A. There was; yes. We were forbidden to manufacture any beer in December, 1918, and in January and February, for the preservation of coal and foodstuffs.

Q. You say in December, 1918——

A. Yes, in December, 1918, and January and February, 1919.

[fol. 120] Q. There was wartime prohibition in effect at that time?

A. Yes, there was wartime pro-bition then.

Q. And that was in effect from when, if you remember?

A. The Fall of 1917 or the Spring of 1918.

Q. Do you recall when Congress passed a resolution submitting the prohibition amendment?

A. I do.

Q. When was that?

A. 1918.

Q. No.

A. Or 1919.

Q. Just a moment. You are guessing at something that I am after. When Congress passed the resolution submitting the proposed amendment to the States, I mean. You know, as matter of fact, that the ratification——

Mr. Feldman: I object to this as leading.

Mr. Hyman: I just want to bring out the facts.

Q. It was in December, 1917, was it not, that Congress first passed the resolution?

A. Oh, yes; that Congress put it up to the States—the Eighteenth Amendment.

Q. Yes.

A. I did not understand you before. I thought you meant when it was ratified.

Q. No. Now, can you tell his Honor of any incidents happening at the beginning of 1918, that indicated that Prohibition was going to become effective?

A. Yes, sir. The first week in January of that year I recollect that Mississippi ratified it within seventeen minutes after they opened the session of both Houses of the Legislature. That did not worry me, because that was the [fol. 121] Southern States, and one after another they ratified it, but what made us feel most uneasy was Massachusetts, Kentucky, and one other Eastern State——

Q. Maryland?

A. Yes, when they ratified it——

Q. Despite the fact that they had previously been in what column, in regard to prohibition sentiment?

A. Oh, as wet as the Atlantic Ocean.

Mr. Feldman: What was that answer?

(Answer read.)

Q. In other words, those were classed as wet states?

A. Absolutely.

Q. In spite of which fact they ratified the amendment in the first month after the matter was submitted to them?

Mr. Feldman: Your Honor, I do not know why we should go into all this with this witness. I do not think it has any bearing on this matter at all.

The Court: I will take it, with an exception to the defendant. It is certainly very interesting.

Mr. Hyman: Yes, and it is judicially determined. Here is the statement of the Bureau—the Advisory Tax Board—and adverting to these circumstances, I am going to fix the period from January 31, 1918, to January 16, 1920, as the obsolescence period for this deduction. The Board of Tax Appeals in the Manhattan Brewing Company case, also judicially adverted to that. I think they did in the Red Wing case, too.

[fol. 122] Q. You spoke yesterday of having converted certain space in your brewery to cold storage?

A. Yes, sir.

Q. Now, tell us how that came to be done?

A. Immediately after the Prohibition Law went into effect, our trade naturally went down to nil. We abandoned virtually, as far as making near beer was concerned, 16 or 17 of our cellars, as we call them, in these four icehouses, out of about twenty cellars and four basements, only using seven of those respective cellars for the continuation of the near beer business, until 1921. Then, when we got an adverse decision of the Supreme Court, we knew we would have to continue in that way, and we dismantled those cellars of their cooperage, and used them for purposes, and are using them today, for purposes outside of the beer business.

Q. You testified yesterday that after an investigation you found that that was the only thing you could use these buildings for—cold storage?

A. Yes, sir; on account of its construction.

Q. As a matter of fact, even assuming that you did that, how would it be from an economic standpoint, using a building of that character for cold storage purposes? I mean, in comparison to a modern cold storage plant?

A. Oh, we can not compete with a modern cold storage plant because they have level floors, and they can get from one building to the other without the use of elevators. We had to put elevators inside the buildings, in order to use two or three buildings at one time, on account of unevenness of the several floors.

Q. How much did it cost you to make the alterations in those cellars?

A. About thirty thousand dollars.

[fol. 123] Q. And you are still using them to store some merchandise in?

A. Yes, whenever occasion requires it.

Q. I believe I asked you yesterday whether that was in successful operation from an economic standpoint—that cold storage?

A. No, sir.

Q. That is, from the standpoint of its financial return?

A. No, sir.

Q. I wanted to ask you also, beginning early in 1918, if it was not the fact that the brewers began to close down here and there in the metropolitan district?

A. Oh, yes.

Q. And was that true elsewhere in the United States, too?

A. All over the country; yes.

Q. And has that been true for the entire period beginning with 1918 and on down to date?

A. Yes. In 1918 we were put under restrictions as to the use of coal by the United States Coal Administration.

Q. Well, that is not what I meant. I meant this: I want to show to the Court that they began slowly to close down, when the first impact of Prohibition struck, and how they acted, as the years went by. Did they increase in numbers, or did they close up and abandon the brewing of beer of any beverage?

A. We took over the Stevenson Brewery, for instance, in 1918, in August, for manufacturing purposes, on account of the small output, with declining sales month after month compared with months in the previous year, and from that time on there has been a steady decrease in the number of operating brewers throughout the country. Before Prohibition there were, I believe, from 1,200 to 1,400 breweries in the United States, and I do not believe that we have a hundred or a hundred and fifty today.

[fol. 124] Mr. Feldman: On what do you base that statement?

The Witness: What am I basing that on?

Mr. Feldman: Yes.

The Witness: On the Internal Revenue reports issued by the United States Government.

Mr. Feldman: Do they show the number of breweries?

The Witness: Yes, sir; they show the number of operating brewers.

By Mr. Hyman:

Q. Now, if it occurs to you, as I ask the question—and if it does not, we will not go into it—but could you tell us some of those in our district here that discontinued operations?

A. Beadleston & Woerz, a large brewery in Tenth Street; Finck's in 39th Street; Bernheimer & Schwartz, at 110th Street——

Q. Bernheimer & Schwartz was above 110th Street, was it not?

A. Yes; 126th Street and 127th Street.

Q. Yes.

A. That is all in Manhattan?

Q. What about the Central?

A. Oh, the Central Brewery closed up in East 68th Street.

Q. And they had over 200,000 barrels?

A. Over three hundred thousand barrels.

The Court: Was that in East 68th Street?

The Witness: East 66th or 68th Street.

Q. The Rockefeller Foundation, I think, has taken that property?

A. Yes, they bought it last year.

[fol. 125] Q. After they closed up.

A. Yes. And over in Jersey there were six or seven breweries.

Q. How about Elias?

A. Oh, yes; Henry Elias, in East 54th Street, I believe it was.

Q. And how about Everard?

A. James Everard closed up, in 135th Street. In fact, they have all closed up but about three or four that are left in Manhattan now.

The Court: In some of our more or less informal discussions here, when you have spoken of these bootleg breweries, are they new establishments or some of the old ones that are doing a bootleg business?

The Witness: Some of the old ones, the smaller ones.

The Court: Some that have come up since Prohibition?

The Witness: No, they were breweries before, but over the City line; and we also have new style breweries now, since Prohibition, which is called a cold-water brewery. That is, a garage, where they have fermenters, and they get the syrup and put water in it, and in three days they have beer, and they sell it. The Government calls them cold-water breweries.

The Court: Is it good beer?

The Witness: It is powerful, but it is not good for the system. It is only about three days old. The Government calls them cold-water breweries—garages.

Mr. Feldman: Those places are some of those that you say are closed up?

The Witness: One that I did not mention was the [fol. 126] Ringler, which was closed up by the Government—padlocked. Then there is the Ebling Brewery Company that is closed up.

The Court: How about the Kip's Bay Brewery?

The Witness: The Kip's Bay is padlocked now. They have a suit for a padlock.

Q. Mr. Loewer, you made a statement yesterday that your output was taken, before Prohibition, by about one hundred customers?

A. Yes.

Q. Have you refreshed your recollection since yesterday as to the number?

A. Yes, I have. I was figuring on the number that we supplied licenses to, which averaged about a hundred; but I believe we possibly had around 160—from 160 to 170 customers.

Q. Do the figures which you gave of the customers that you had left after Prohibition—are they to be revised, or do they still stand at six?

A. They still stand.

Q. The number that you gave was six, and they take about a barrel a week?

A. Two half-barrels a week.

Q. Now, let us come to this question of the value of the brewery trade—the barrelage value. I think we were about to start on that yesterday. Can you give us the records, or your recollection of your knowledge of sales of brewery trade, which have taken place in Greater New York prior to Prohibition?

Mr. Feldman: May I, for the purposes of the record, your Honor, have an exception to this line of testimony, [fol. 127] for two reasons: first, that this is not a proper method of proving the value of good will, and, secondly, because good will can not be subject of obsolescence, and, therefore, no proof should be entertained on that point.

Mr. Hyman: That, of course, goes to the very crux of the case, your Honor. I am not going to prove good will in the sense that Mr. Feldman thinks of it.

The Court: The objection is overruled, with an exception to the defendant.

Q. Will you answer the question?

A. Yes, sir.

Q. You said, if I recall correctly, that there was a ready market value for brewery trade?

A. There was, yes.

Q. And if I also recall, you explained the avidity to get hold of other brewers' trade, because of the economic advantage of increasing the output?

A. Yes, sir.

Q. Now, will you tell us some of the sales that took place prior to Prohibition?

A. There was the Haffen Brewery, of the Bronx, sold to Jacob Ruppert. There was the Finck——

The Court: Give us the dates of the sales, and whether or not the sale included the plant.

Mr. Hyman: In some cases it did, as I will show; but Mr. Feldman is offering now to let me put these figures in from the record, and that will save a lot of time.

Here is the list—that is, of some of them—only a few of them.

There is a sale by Conrad Stein Brewery to the Lion [fol. 128] Brewery; a sale of trade by Fred Opperman, Jr., Brewing Company, to the J. Chr. G. Hupfel Brewery.

By Mr. Hyman:

Q. Do you know, Mr. Loewer, whether anything went with the sale of trade of Opperman to Hupfel?

A. No, no machinery or anything else but the trade—the barrelage, as we call it.

Q. Do you remember the price at which that was sold?

A. I think it was $3.00 a barrel or thereabouts. It was a small brewery, with about 30,000 barrels output.

Q. And the sale of the Conrad Stein Brewery to the Lion Brewery, was that a sale of the entire plant?

A. No.

Q. What was that?

A. Just the trade.

Q. And how big was the Conrad Stein Brewery?

A. I think it was between 40,000 and 60,000 barrels, but I am not sure.

Q. Have you a recollection of the price that that brought?

A. The Stein Brewery, I believe, brought four dollars a barrel, but if I can refresh my recollection——

The Court: Four dollars a barrel for what period?

The Witness: The yearly sales. For instance, a 60,000-barrel brewery would bring $240,000 for the trade—and that would usually cover the chattel mortgages and the trade.

Mr. Feldman: Just as a matter of information, what happened to these breweries that sold their trade? Did [fol. 129] they simply discontinue business?

The Witness: Conrad Stein sold the property, and the milk people are there now.

Mr. Feldman: The milk people?

The Witness: Yes, the Slawson-Decker people. Finck's Brewery was torn down, in 39th Street.

Mr. Feldman: Did the Conrad Stein plant—was that torn down, too?

The Witness: Oh, yes.

Q. Here is one by the Manila Anchor Brewing Company to A. Hupfel & Sons. That was a very small bit of trade, was it not?

A. Yes, up in Dobbs Ferry. Very small.

Q. How many barrels did they sell?

A. I don't know. I believe it was under 25,000. I don't know, however.

Q. You do not recall that transaction?

A. Not definitely, no. I recall the transaction in general.

Mr. Hyman: I had a record of that.

Mr. Feldman: Did the buildings go in that sale?

The Witness: No.

Mr. Feldman: What did they do with them?

The Witness: The Hupfel Brewery is in 39th Street, and the Manila was in Dobbs Ferry.

Mr. Hyman: They had just a little trade, that was spread around.

Mr. Feldman: What happened to the Manila Brewery? [fol. 130] The Witness: I don't know. I could not say whether it is still in existence, or whether it was torn down.

By Mr. Hyman:

Q. Here is one of the Bachmann & Bechtel Brewing Company to Lembeck & Betz. Do you remember what that sale was?

A. I believe it was 30,000 or 40,000 barrels.

Q. Well, it was 80,000 barrels at $3.75 per barrel.

A. Those are two breweries together.

Q. Do you remember Joseph Doelger's Sons and Hoffman Brewing Company—that transaction?

A. Joe Doelger sold to Hoffman.

Q. Do you know what the price was for the trade there?

A. I believe it was between three and four dollars—a small brewery, and subsequently it has been torn down.

Q. How small would you say Doelger's output was at that time?

A. I think somewhere around 25,000 to 30,000 barrels.

Q. It was just a trifle over 30,000, I think.

A. Well, I don't know exactly.

Q. Did you give us the price of the Finck sale to the Hoffman Brewing Company?

A. The Finck people got $3.50 a barrel.

Q. How big was their output?

A. Their output was about 40,000 barrels.

Q. Do you know something about the Park Consumers and the Ebling Brewing Company?

A. I know that the Park Consumers sold their output to the Ebling Brewery.

Q. And do you recall the price?

A. No, I do not.

Q. That was not the brewery that Mr. Reisenweber was interested in?

A. No.

[fol. 131] Q. What was that?

A. The Excelsior.

Q. He bought some trade?

A. He bought some of the Munch Brewery.

Q. Do you recall what he bought?

A. From memory, I do not; no.

Q. Now, did you, as a member of the Brewers' Board of Trade and as an officer of the Union Brewers' Association, have knowledge at the time that these various sales were made, with regard to them?

A. I did.

Q. And were you thoroughly familiar with the market values of trade of this character throughout this section of the country which you have described as the Metropolitan District?

A. I was.

Q. Now, what would you say was the value of an output of 100,000 barrels, or 98,000 barrels as you have put it, of

the character of trade that the plaintiff in this action had prior to Prohibition?

A. I would say it was worth at least four dollars per barrel.

Q. Now, what do you include in that price?

A. The trade and the chattel mortgages.

Q. Now, will you tell me what your average investment in chattel mortgages was, during that period?

A. Approximately two dollars a barrel, or $200,000.

Q. Was that about the general ratio of the chattel mortgages investment to the trade?

A. No. It was as to that capacity, that the larger the brewery got, the larger the mortgages got, and the smaller the brewer was, the smaller his mortgages were, but it would equalize itself somewhere between $1.50 a barrel and $2 a barrel.

Q. Was that trade approximately in the same status as to output and control and market value at March 1, 1913?

A. Yes, sir.

[fol. 132] Q. Your output was a bit larger in 1913?

A. Yes.

Q. Your average output?

A. Yes.

Q. And were your chattel mortgages of approximately the same average at that time?

A. The same average.

Q. They would run about two dollars a barrel?

A. Yes.

Q. Now, with regard to your buildings, were they kept in repair during the time you were operating the brewery?

A. Yes, sir; in first class condition.

Q. Were your buildings approximately of the value in 1913, 1914, 1915 and 1916, with allowance for normal depreciation—that is, were they worth any less in 1913?

A. No, they were not.

Q. Your buildings had, did they not, their full depreciated cost value to you as long as you could continue the operations of your plant as a brewery?

A. Yes, sir.

Q. For the manufacture of intoxicating beverage?

A. Yes, sir.

Mr. Hyman: I think that is all.

Cross-examination.

By Mr. Feldman:

Q. I would like to have you explain to me again, Mr. Loewer, about these mortgages. Have you in court a copy of any one of these mortgages that you took?

A. No. You mean those chattel mortgages?

Q. Yes.

A. No, but I could get one, if you want it.

[fol. 133] Mr. Feldman: Can I agree with Mr. Hyman that one of those mortgages, together with the license agreement, and all that——

The Witness (interposing): I have a license agreement here—a license assignment. I have that here.

Mr. Hyman: Let us give that to Mr. Feldman.

The Witness: All right. It is in my envelope there (indicating).

Q. Was there anything in the mortgage or in any of these papers that were held or by which you controlled the trade that specifically forced the saloon keeper to buy his beer from you?

A. Yes, sir.

Q. Was there a stipulation in the agreement to that effect?

A. There surely was.

Mr. Hyman: Here it is (handing paper to Mr. Feldman).

Q. In what particular paper would that agreement be contained.

A. You mean as to the use of our beer?

Q. Yes.

A. In the chattel mortgage, I think.

Q. In the mortgage?

A. Yes.

Q. Do you mean that one of the conditions of the mortgage was that they were to buy beer from you?

A. It was either in there—I am sure it was—but that was naturally the understanding amongst all the trade.

Q. You say that was the understanding, but are you sure that it was in the mortgage?

A. Yes, I am pretty sure. I have not seen one in eight or nine years.

[fol. 134] Q. The reason I ask that is that I was at one time informed by someone connected with this case that it was not contained in any of these papers. For that reason I would like to get one of those mortgages, and to put it in evidence, if necessary.

A. Yes, sir. I can send for one.

Mr. Feldman: May we agree that the record be kept open for that particular exhibit to be introduced?

The Court: Oh, yes, you may put that in later. It is deemed marked in evidence now, and you may just put a number on it.

Q. How long did these mortgages usually run?

A. They were renewed from year to year, as long as we held the customer. We did not care how long they ran. He paid his bills and used our goods.

Q. Did you usually enter into a new agreement each year?

A. Oh, no. We filed a certificate each year at the Register's office, to keep the chattel mortgage alive, which we had to do under the law. We had to renew our chattel mortgage each year. I have some that we had for twenty to twenty-two years—twenty to twenty-two years old.

The Court: How old?

The Witness: From twenty years to twenty-two years old. We had customers that long.

Q. And all payable on demand?

A. Oh, yes.

The Court: When Prohibition came along, did you collect the amounts of these chattel mortgages?

[fol. 135] The Witness: We tried to. Some were judgment proof, and others paid up their mortgages, and in some cases we would compromise with them. If a man had a $2,000 mortgage, and the fixtures had been in use for, say, ten years, and he said he could only pay back $1,000, we had to use our head, and we took the $1,000 rather than take a judgment, and perhaps not get anything.

Q. When these mortgages were sold, was it the mortgage that was sold, or was it the trade in general? As a matter of form, did the brewer agree to sell his mortgages together with the license agreement, or any other paper, or did he sell anything else?

A. No, not the license paper. He sold all his chattel mortgages that he held against this trade, and turned over all the customers to the other brewer who purchased it, and he discontinued serving them.

Q. Just what do you mean by turning over all the customers to the purchaser?

A. If I paid another brewery for their output, I would make my arrangements at so much a barrel—say, $4 a barrel. For that I was to supply his customers, of which I had a list, and receive from him all the chattel mortgages, amounting, say, another two dollars a barrel. Then I would file the list of those customers in the Lager Beer Brewers' Board of Trade, as my trade, and nobody else would or could supply those customers.

Q. You had an arrangement between all the brewers that no brewer would poach any other brewer's trade?

A. Yes, sir.

[fol. 136] Q. And you acquired a right to that trade by showing that you had a chattel mortgage on the property?

A. Yes, or if I made three deliveries successively of beer to that place, that was my customer.

Q. By that you mean that all of the saloon keepers were not tied up in this way?

A. No, I will put it another way: they were all tied up but a very few.

Q. And as to those few, if you made three successive deliveries to them——

A. (Interposing.) They were my customers.

Q. They became your customers?

A. Yes, sir.

Q. Was there any way for one brewer to take a customer away from another brewer?

A. Only by a sale of the saloon to another party.

Q. How about the saloons that were not tied up by chattel mortgages?

A. They could not get beer, unless the proprietor sold the saloon to someone else.

Q. And if the proprietor sold the saloon to someone else, that new purchaser would be free to deal with any brewer he felt he wanted to deal with?

A. Yes, sir.

The Court: The witness said that the saloon keeper could not get a new brewer unless he sold his saloon.

By Mr. Hyman:

Q. How many saloons would you say you supplied that did not have your investments in them?

A. Probably two or three. You mean that were independent?

[fol. 137] Q. Yes.

A. Two or three.

Q. And what would you say their total purchases were?

A. Forty or fifty half barrels a week each.

Q. And fifty weeks a year, that would be 2,500 halves, and that would be about 1,200 barrels?

A. Yes.

The Court: You are not claiming, are you, in this item of obsolescence the investment of $200,000?

Mr. Hyman: No, sir. I am subtracting that.

The Court: All right.

By Mr. Feldman:

Q. You say that the investment was about two dollars a barrel?

A. Yes, about two dollars.

Q. How do you figure that?

A. Well, it just happens to figure that way.

Q. In other words, your investment probably went up to $200,000 as an actual investment in all these saloons?

A. Yes.

Q. And if you took that investment and divided it by the number of barrels sold each year to these saloons, it would come about two dollars a barrel?

A. Yes.

Q. Have you any record in court to show the total amount of chattel mortgages which you had outstanding before Prohibition?

A. I have my auditor here. I don't know whether he has them.

Mr. Hyman: I have an extract from the books, Mr. Feldman.

[fol. 138] Q. In the meantime, let me ask you this: In negotiating sales of these chattel mortgages, did the price to be paid for the barrelage depend in any way upon the reputation of the brewer who sold the barrelage, or on the quality of the beer that he sold?

A. No, it would depend more on the size of the output.

Q. Did anything depend upon the trade name?

A. The trade name?

Q. Yes.

A. No, because that disappeared. The closing brewer's trade name disappeared immediately.

Q. In no case that you know of did the trade name continue?

A. Oh, no; not in one case.

Q. How about cases where the brewery was sold only with the trade?

A. The trade name disappeared, too.

Q. It was all sold under the name of the purchaser?

A. Yes, always. That happened in the case of Mr. Ruppert when he bought the Haffen Brewery. He bought the property and all. There was no more beer sent out, except in Mr. Ruppert's packages.

Mr. Hyman: That is a very interesting phase, your Honor, of this question, demonstrating how completely it was the idea of getting the output, because they destroyed the good will that attached to the name immediately, and supplied the beer under their own name in every case.

Q. What happened to those saloons? I presume the saloons that were controlled by this trade had the name of the brewer whose product they were selling on their doors or over their doors. Did they take it down and put up [fol. 139] another name?

A. In this particular case, I know, as a fact, that the customers of Haffen were very glad to get the name of Ruppert on, because they thought he had a larger and bigger reputation. They were all changed.

Q. Do you know of any cases where the name was not changed?

A. No. The trade name of the closing brewer disappeared immediately.

The Court: How about the name on the bottles? Was that of no value at all?

The Witness: They would take the bottles if they were the same size.

The Court: I do not mean the bottles themselves, but I mean the good will that attached to the bottled trade. That was a complete loss, was it?

The Witness: At that time the bottled trade did not amount to but five or ten per cent, and there were only about four brewers bottling.

Q. Do you mean to say, Mr. Loewer—take, for instance, the name of Ehret. Did that have no trade value at all?

A. Ehret's name, certainly, had a trade value; but if Mr. Ruppert bought Mr. Ehret's output, Mr. Ruppert would immediately discard the name of "Ehret".

Q. You mean he might do that?

A. I know he would, because Mr. Ehret's sales dropped from a million and a quarter barrels to 44,000 barrels last year.

Q. Suppose that these were pre-Prohibition days, and Ehret sold out to Ruppert, would you say that Ruppert [fol. 140] would not consider for a moment using Ehret's name or selling his beer?

A. I can answer you only in this way, that neither one of them would sell out to the other, because they were always in a race to see who was going to sell the most beer next year.

Q. I am asking you to suppose that they did.

A. Do you mean if Mr. Ruppert bought Mr. Ehret's trade?

Q. Yes.

A. I think Mr. Ruppert would have his name used only, and would discard the name of Ehret after he had bought it.

Q. Suppose you were in a position to buy the Ehret trade in pre-Prohibition days, do you think that it would not have been worth your while to continue the Ehret name as to that part of the trade that used Ehret's beer.

A. Taking my own case, Ehret's reputation was larger than mine. If I had bought Ehret's trade, I would have asked Mr. Ehret to allow me the permission to use his name.

Q. Precisely.

A. Which he would not have done, of course.

Q. Why not?

A. Why should he? He had a wonderful reputation, and I might spoil it.

Q. Well, at any rate, from what you say there was a value that attached to the trade name?

A. Oh, yes.

Q. Which might or might not be destroyed by the purchaser, as he saw fit?

A. But it was destroyed by each purchaser that I have mentioned.

Q. As a matter of fact, it might have been destroyed by the purchasers that you mentioned, but the trade name had a sufficient following, a purchaser might act very wisely in continuing that trade name.

[fol. 141] Mr. Hyman: Of course, you realize that I am not making any claim concerning the value of the V. Loewer's Gambrinus Brewery Company name—trade name or trade-marks at all, but only for the barrelage value of his output.

The Witness: I think I answered that before, Mr. Feldman.

Q. Now, coming back to the value of the actual cash invested in these chattel mortgages, in 1918 I presume you had about $200,000 invested, did you, is that right?

A. Yes, it runs around that neighborhood.

Q. Approximately?

A. Yes.

Q. What part of that $200,000 was actually repaid to you, do you know?

A. Eventually, you mean?

Q. Yes.

A. When 1918 came along?

Q. Well, from 1918 to the present time, say.

A. From 1918, very little; very little.

Q. Fifty per cent?

A. Fifty per cent? Oh, no. I would not want to guess at it. I don't think it was ten per cent.

Q. You say it probably would be under ten per cent?

A. I believe it would be under ten per cent, yes, sir.

Q. You consider the other ninety per cent lost?

A. They were lost; yes.

Q. Have you written them off your books?

A. We have; yes.

The Court: Did you get an allowance in your income tax for that?

The Witness: Yes, we did.

[fol. 142] Q. You got an allowance of $190,000 or thereabouts?

A. Whatever the income tax returns show.

Q. But you made a claim for everything that you considered bad, as far as chattel mortgages go?

A. Oh, yes. As these places closed in the year, we wrote them off the books, because they were lost.

Q. You testified, Mr. Loewer, that you had about 160 customers for your barrelage output?

A. Draft beer customers, yes.

Q. That is before Prohibition?

A. Yes, sir.

Q. How many customers did you have taking your bottled goods before Prohibition?

A. Before Prohibition?

Q. Yes.

A. We went into the bottled beer business in 1911—we started in it at that time. Just before Prohibition I would say we possibly had two or three hundred customers.

Q. Two or three hundred customers?

A. Private and stores—private trade and stores.

Q. Stores and grocers?

A. Grocers and delicatessen stores.

Q. When you commenced the manufacture of near beer, did you retain these customers?

A. Yes.

Q. And you increased them? That is, you got new customers in addition to these customers, for bottled goods, that you had before Prohibition?

A. Yes, each year.

Q. About how many customers have you got today?

A. Probably five or six hundred.

Q. That is, five or six hundred customers?

A. Yes, sir.

Q. Now, as I understand it, you have four ice houses, and they are separate buildings, are they?

A. Yes, each one, adjoining each other.

[fol. 143] Q. And one brew house, and a boiler house, and an engine room, and a copper shop, and a pump room?

A. Yes, sir.

Q. And each one of those is a separate building?

A. No.

Q. They are all together?

A. The four ice houses are four separate buildings. The brew house is a fifty-foot front, and goes back in an L-shape, and is twenty-five feet in the rear. That twenty-five feet goes into the next building. We have a boiler house that was built all by itself.

Q. You mean that it adjoins the boiler house?

A. Yes.

Q. And would you call it the same building?

A. No, it was built at a different time.

Q. In other words, the brew house is one building, and the boiler house is another building?

A. Yes. This will explain it (handing paper to Mr. Feldman), if you want to see it.

Q. Yes. Thank you. Would you say that the engine room is another separate building?

A. Yes. The engine room is in No. 521.

Q. And the cooper shop?

A. That is in No. 521.

Q. You mean the cooper shop is in the same building with the engine room?

A. Yes.

Q. And how about the pump room?

A. That is also in No. 521 and No. 523 also—the rear of No. 523.

Q. You mean that a part of the pump room is in the room with the boiler house?

A. Over the boilers, yes.

Q. In other words, you have seven buildings altogether?

A. Seven lots with buildings on them.

Q. That is, seven lots with seven separate buildings on them?

A. Yes, sir.

[fol. 144] Q. You are now, at the present time, using all four of the ice-houses, is that right?

A. We are using the four of them for cold storage and for near beer.

Q. And how about the brew house?

A. It is just only being used to brew near beer.

Q. And the boiler house?

A. Only for near beer.

Q. Only for near beer?

A. Yes.

Q And the building housing the engine room, the cooper shop, and the part of the pump room?

A. We are using it the same as we did before.

Q. The same as you did before Prohibition?

A. Yes, except the two upper floors in No. 521, we have leased out, where we used to store our beer kegs.

Q. What do you lease it out for now?

A. The storage of scenery.

Q. Of what?

A. Of theatrical scenery.

Q. That is not a cold storage plant?

A. No. That is dry.

Q. This cold storage corporation that was formed, do you own that yourself?

A. We control it; the family controls it.

Q. While I am on that subject, is this V. Loewer's Gambrinus Brewery Company a family corporation?

A. It is.

Q. And who are the stockholders?

A. My brother's widow has one-third of the stock; I and my daughters have one-third, and my sister and her four children have one-third.

Q. And the cold storage corporation, I assume, is owned in similar proportions by the same people?

A. In thirds.

Q. By the same people?

A. Yes.

Q. And is that corporation run separately and apart from [fol. 145] the near beer business?

A. Yes, sir.

Q. As a matter of accounting, do you keep separate books?

A. We do, and file our returns——

Q. (Interposing.) Does the cold storage corporation lease the storage space from the brewery, or has it sold it—has the brewery sold it to the cold storage corporation?

A. It leased the storage space and paid rent the first and second years, and later on the storage business got poor, and they have not paid any rent since; they have not made any money.

Q. But they are still engaged in the storage business?

A. Yes, sir.

Q. And they are still storing merchandise there?

A. Yes, sir.

Q. When these buildings were built, what was the expected life of each of them? How long did you expect they would last?

Mr. Hyman: Your Honor, that is subject to stipulation. All those figures have been fixed. We have depreciated costs, and the dates, and we are just wasting time on that.

Mr. Feldman: Your Honor, this particular matter has to do with an argument on the law as to whether or not they should be allowed obsolescence, when they are still using part of the buildings, and when the record will show, if this question is answered, that these buildings—their normal life is, say, fifty years more.

The Court: But Mr. Hyman says it is already in the record.

Mr. Feldman: I think that all we have stipulated is the [fol. 146] cost of the buildings and the present depreciated value.

Mr. Hyman: The depreciated cost is stipulated as of December, 1917.

Mr. Feldman: But that stipulation does not contain anything with reference to the life of these buildings.

Mr. Hyman: That has to be in there. We are starting from December, 1917, and the Internal Revenue Bureau stipulated that our buildings were worth the depreciated value, December 31, 1917.

The Court: But how does that show the life?

Mr. Hyman: We proceed from there, sir. If we are entitled to obsolescence, it must be based upon the depreciated cost.

The Court: But he says that it is important to have the life of the building proved?

Mr. Hyman: If there is any possible reason for it, of course, I have no objection.

The Court: You thought that was already in the record?

Mr. Hyman: Yes, and there is no doubt about it.

The Court: But from what you have told me, it is not. The mere fact that the depreciated cost is in the record does not show that the life of the buildings is.

Mr. Hyman: Yes, it has been fixed. They took a figure in 1905 and brought it down to 1917. That was depreciated in accordance with the rules of the Bureau.

The Court: Does that involve taking into account the life of the buildings?

[fol. 147] Mr. Hyman: Yes, sir.

The Court: And does it appear what the ruling was as to the life of the buildings?

Mr. Hyman: Yes, sir.

Mr. Feldman: I would like to see it.

The Court: Of course, if it does, we need not go into this.

Mr. Feldman: The stipulation simply shows that we allow two per cent per year depreciation on the buildings.

Mr. Hyman: Here it is, your Honor (reading).

The Court: I suppose it might possibly be inferred, from the fact that that was two per cent., that the life is fifty years. That is merely an inference, however.

Read the question, Mr. Stenographer.

(Question read.)

The Court: Just answer that question.

Mr. Hyman: Your Honor, I did not read the last part of that stipulation, if I may read it now?

The Court: Yes.

Mr. Hyman: (Reading.)

The Court: But that does not show anything as to the life of the buildings. He says he wants that fact in the record.

Mr. Hyman: I do not object to that.

The Court: And it is not in the record yet. If it is there only inferentially, that does not cover it.

Mr. Hyman: For the purpose of this case we had fixed definitely the depreciated cost as the basis on which we were to claim our obsolescence.

[fol. 148] Mr. Feldman: I will not dispute those facts at all.

The Court: Let him have this additional fact in the record.

Mr. Hyman: All right.

The Court: What was the life of the buildings contemplated when you put them up?

The Witness: I could only say that the one building was built in 1879, and is still in good condition; and on that memorandum that I gave you I can tell you the years that they were built.

By Mr. Feldman:

Q. Could you tell me what the estimated life of the buildings was at the time they were built? If you do not know, just say so.

A. I was a boy thirteen years old in 1879.

Q. Would you know now what the average——

A. (interposing) I know now that the building is close on to fifty years old, and is in good condition.

Q. How long do you expect it to stand, if nothing happens to necessitate its being torn down?

A. Quite a few years.

Q. Will it be fifty years?

A. I would not want to say fifty years, no. I do not know. That is a matter for an architect, I think.

The Court: Does that apply to all the buldings, or just one of them?

The Witness: Well, we write off two per cent, and naturally I always thought that we figured the life of a building at fifty years—not because a building might not last longer than that, but conditions change, and you might [fol. 149] want to have something else in its place. Somebody might want to buy the property. I know that this one building is up since 1879, and is in good, strong physical condition today. The other buildings were put up later, and that memorandum that I gave you shows that, if I may have it.

Mr. Feldman: Yes (handing paper to the witness).

The Witness: The first one was in 1879, and the next one in 1881, and the next one in 1888, and then in 1902 and 1906, and then I have got two more in 1896.

The Court: Have you not already been allowed the full one hundred per cent upon fifty years——

Mr. Hyman (interposing): No, your Honor. This figure that we have is a composite figures which resulted from

our negotioations with the Bureau. Over a long period of years there was no depreciation taken out at all. Of course, many business people believe that if they are keeping their buildings in good shape, they should not depreciate them. At any rate, our figure which has formed the basis of all our negotiations, we have agreed upon—that our depreciated costs, adjusting everything, was so much at 1917, and we must be entitled, if at all, to an allowance on that basis. That is the agreement in this case, and that is where we start from here.

The Court: But you will concede this, will you not, Mr. Hyman, that if there had been an income tax from 1879, [fol. 150] and if you had been allowed your two per cent each year in depreciation—physical depreciation—you would not be now entitled to anything for obsolescence?

Mr. Hyman: I think that would be so. I think that would be so if we assume that the value of the buildings has actually depreciated out over the fifty years.

The Court: If the Government had allowed a deduction of two per cent each year from the beginning——

Mr. Hyman (interposing): There would be nothing to depreciate now in that case; but in the course of those years there was so much reconstruction and additions, and tearing down in all the buildings, that it would have to be figured up separately, and it is never arrived at in that form. You finally get to some figure, in the Bureau, which represents what those buildings are worth on a given date, and there you start to figure. It is so complicated a problem that they never attempt it. They just agree with the taxpayer on some particular value at some particular date, as they have done in this case.

Mr. Feldman: That is a question of law, with which I am not quite familiar, but I would like to argue it when the briefs are ready. That is, that even though they were not allowed two per cent prior to 1913, it may very well be that the buildings should have been written off by this itme, and, therefore, they would not now be entitled to depreciation—either depreciation or obsolescence.

[fol. 151] Mr. Hyman: That is not in this case at all, because it is stipulated.

The Court: Well, let us go ahead and make the record, and argue that later.

By Mr. Feldman:

Q. You testified, Mr. Loewer, that you abandoned some part of your machinery and equipment?

A. Yes.

Q. And some part of your trucks and cooperage and things of that sort?

A. Yes, sir.

Q. As a matter of fact, you were allowed, for income tax purposes, by the Bureau everything that you claimed on account of obsolescence on everything in the nature of equipment and machinery—in fact, everything except the actual buildings themselves?

A. Yes, sir.

Q. That is, the four walls and the floors in between, you were allowed for everything else?

A. Yes.

Mr. Feldman: Would you have any objection, Mr. Hyman, if I were to offer in evidence a statement submitted to me by you, analysing the allowance by the Department for obsolescence on all machinery and equipment? They allowed something like $75,000 for 1918, and a little over that for 1919. You gave me an analysis of that.

Mr. Hyman: I think those letters show it.

Mr. Feldman: I was never able to understand it until I got your statement.

(Informal discussion, off the record.)

Mr. Hyman: The revenue agent had allowed $52,000, [fol. 152] and they increased it by $23,000, to $75,000. Is that the way it is made up?

Mr. Feldman: That is the way I got it from you. It agrees with those figures (handing paper to Mr. Hyman).

Mr. Hyman: I see no objection to that. Those are the final results. That is quite all right, if they tally.

Mr. Feldman: Just mark that, please.

(Paper marked Defendant's Exhibit A.)

Mr. Feldman: And it is stipulated, is it, that this was all of the obsolescence and depreciation claimed for those years, 1918 and 1919, except the obsolescence claimed for buildings and for intangibles?

Mr. Hyman: I will not say that without checking up its accuracy.

Mr. Feldman: All right. Will you receive it subject to check?

Mr. Hyman: Yes, but I would like to check and see if those are all we claimed.

Mr. Feldman: I offer in evidence a certified photostatic copy of the income tax return of this taxpayer for the year 1918 (handing paper to Mr. Hyman).

Mr. Hyman: I am sure there will not be any objection to that. This is 1918, is it?

Mr. Feldman: Yes.

Mr. Hyman: No objection.

(Paper marked Defendant's Exhibit B.)

The Court: Mr. Hyman, if the business before Prohibition had been ninety-five or ninety-eight per cent. bottled beer business, as now conducted, so that there was not this [fol. 153] definite list of customers, would you still claim that the loss of good will would be obsolescence?

Mr. Hyman: No, sir.

The Court: Which should be allowed for?

Mr. Hyman: No, sir, I would not claim it on any theory; because I do not believe it would have any value. Of course, if I could demonstrate that locally a trade of that kind did have a value—which would be very difficult—then, of course, I could claim obsolescence; but this case is sui generis. You will not find any other industry where such a situation exists.

The Court: Well, I do not follow you, when you say that the good will would have no value——

Mr. Hyman (interposing): I did not say that, sir. I say that this is so different from any ordinary good will that you really can not solve the problem——

The Court (interposing): What I want to know is what your attitude is with regard to the more usual form of good will—the good will that attaches to a name largely, and aided perhaps by the regularity of dealings, and so forth—the ordinary type of good will, such as attaches at the present time to the bottled trade, whether you think that such good will would be a proper subject of obsolescence?

Mr. Hyman: I would think so, yes.

The Court: Within the meaning of the statute?

Mr. Hyman: Yes, sir, by all means. If you could demon- [fol. 154] strate that a business which had been built up,—which had built up a good will in this sort of a beverage, and some economic upheaval came along that destroyed it, I can not find the slightest excuse for saying that "there is a form of loss which the taxpayer has sustained, which ought not to be compensated by a deduction from gross income, and here is another claim that ought to be". There is not any warrant in the statute for that. After all, the idea is fundamental; we want to give back to a man, out of his income, what he has lost. Suppose it was some other casualty?

The Court: The only point is that the statute specifically enumerates the deductions that you are permitted to take.

Mr. Hyman: Yes.

The Court: An economist might point out some other forms of losses, which are not included in the deductions as set forth in the statute, of course.

Mr. Hyman: I do not think you can think of one.

The Court: The question is whether or not the word "obsolescence" can apply to this sort of a loss. However, I do not intend to have further argument on that at this time. I just wanted to get your idea about it, to make sure that I had entirely your thought.

Mr. Hyman: Yes. For example, the likened—take this obsolescence deduction, and they were always confused as [fol. 155] to when that loss ought to be taken. Now, some of them wanted it to be complete. In other words, they waited until it was obsolete, first, and then wrote off the entire loss.

The Court: You do not need to go into that at this time.

Mr. Hyman: All right.

The Court: Just go ahead now and make your record.

Mr. Feldman: I offer in evidence a certified photostatic copy of the return filed by this taxpayer for the year 1919 (handing paper to Mr. Hyman).

Mr. Hyman: Are these the only things that were filed by the taxpayer?

Mr. Feldman: As far as I know, yes.

Mr. Hyman: I am assuming that they are all correct.

Mr. Feldman: Well, if they are not, they can be corrected. You can check them up.

The Court: As I understand it, you never did any bottling before Prohibition?

The Witness: Yes, in 1911 we started it.

The Court: Are you making any claim in this case for obsolescence on the bottling?

Mr. Hyman: No, sir.

The Court: He says he was bottling since 1911.

The Witness: Yes, sir. Our bottled output was about five per cent. of the entire output. The rest of it was draft beer.

Mr. Feldman: Just mark those, please.

(Papers marked Defendant's Exhibit C.)

(Papers handed to Mr. Hyman by Mr. Feldman.)

[fol. 156] Mr. Hyman: These are simply observations made by an auditor, who audited the books for the Inter*national* Revenue Department.

Mr. Feldman: But I want to complete the record as to what happened up to this point, your Honor.

The Court: It might be enlightening to me. I do not know.

(Informal discussion, off the record.)

Mr. Feldman: All right, I will leave that out. I offer in evidence a certificate of overassessment issued to this taxpayer for the year 1918.

Mr. Hyman: I think that none of these things are going to be very helpful, in the last analysis. I do not care, if they are not too voluminous.

(Papers marked Defendant's Exhibit D.)

(Informal discussion, off the record.)

The Court: You can get together later, and put in whatever you want, and they can be marked in evidence later, if you wish.

By Mr. Feldman:

Q. Is it a fact, Mr. Loewer, that although you are using parts of all of the buildings, and not using all of all of the buildings, that if the cold storage business increased or the

near beer business increased, you could use all of the buildings all the time?

A. I did not get that.

Q. (Question read.)

[fol. 157] The Witness: If the near beer business increases in volume, I could use all the buildings that have been altered in 1921, by putting in near cooperage, and using those buildings again for near beer. If the cold storage business increased, on the other hand, I could not use the two older or westerly buildings, as they are, because the pipes are on the ceiling, and you can not permit dripping on merchandise, and they would have to be put on the side walls, at an expense of probably, oh, I don't know—maybe fifteen or twenty thousand dollars today.

Q. Do you know, Mr. Loewer, whether in the manufacture of real beer bootleggers today would necessarily use all of the machinery that you have in your brewery?

A. I know that it is not so, because we have two styles of bootlegging brewers; one a real brewer, and the other a cold-water brewery, in a garage. They do not need any machinery.

The Court: Is their product poisonous?

The Witness: No, but it affects your bowels probably the next day, if you drink too much. It is too young. It is probably only thirty-six hours old, and has three and a half per cent. of alcohol in it. It tastes very nice. Some of them filter it and some do not.

The Court: How do they make it?

The Witness: They get malt cereal, which you can buy from any cereal concern, and it is hop-flavored—flavored with hops in the syrup, and they take that syrup and put it [fol. 158] in the fermenter tank, and it starts to ferment itself.

The Court: And that is all they have to do?

The Witness: Yes, and in three days you skim off the yeast, and it is up to three and a half per cent. of alcohol. They filter it, if they run on a big scale, and put it in a barrel, and the "dummy" buys it, and, of course, if it is no good, they make redress.

The Court: Is it charged with gas?

The Witness: Oh, no, it has its own gas, from the alcohol. Some of them carbonize it.

The Court: Does it get better as it gets older?

The Witness: No, it gets worse. It commences to get thick. The yeast has not been abstracted from it.

The Court: It should not be kept over a week?

The Witness: It should not be kept over forty-eight hours, and it should be kept cold, and then it will not get thick. It is really checked fermentation beer. If you leave it in a closed package, it becomes as thick as mud.

Mr. Hyman: Would your Honor care to hear something about the regular process?

The Court: No.

By Mr. Feldman:

Q. As a matter of fact, Mr. Loewer, do you know whether there are any brewers today who are making bootleg beer?

[fol. 159] Mr. Hyman: Well, your Honor, I would not want him to answer a question like that. I think that should not be in this record.

The Court: I will allow him to answer it.

Mr. Hyman: In the first place, it is not competent and has no bearing on this case at all.

The Court: But he is an expert in this line.

Mr. Hyman: But, after all, your Honor does not want him embarrassed? I do not know what he knows, but you would not want to embarrass him by making any statement concerning other people?

The Court: No, not specifically; certainly not. He is not asking for names.

Mr. Feldman: Oh, no.

The Witness: Yes, I do know.

Q. You do know?

A. Yes, sir.

Q. You do know of them?

A. Yes, right here in Manhattan.

Q. As a matter of fact if you cared to sell your plant, and did not care who bought it, there is no reason why a purchaser who bought it should not use it for the manufacture of real beer?

A. Anybody who wants to buy our plant pays all cash, and I don't care what he does with it.

Q. Do you know what part of your buildings—what the assessed value of all of your buildings is? That is, the real estate assessment?

A. You mean those seven lots on the north side——

Q. (Interposing.) Yes.

A. The auditor may know or I can find out from the office.

Q. Do you know whether the assessment on those build-
[fol. 160] ings since 1918 increased or decreased?

A. I believe there has been a slight increase every few years. I don't think we have any that has been decreased.

The Court: There was an increase in value as real estate, was there not?

The Witness: Yes.

The Court: In 1918, 1919 and 1920?

The Witness: Yes, I believe every few years we have had an increase in our real estate.

Mr. Hyman: His Honor wants to know whether there is an increase in the actual value of the real estate.

The Witness: Oh, yes; there is.

The Court: And a part of it occurred during 1917, 1918, 1919 and 1920?

The Witness: Yes, I believe so.

The Court: That is, considering the thing as one unit, the land and your buildings thereon, the market value of that went up, did it not?

The Witness: Yes, sir.

The Court: During 1917, 1918, 1919 and 1920?

The Witness: Yes, sir; the market value went up.

The Court: All right, go ahead.

Q. I just want to go back for a moment to those mortgages. Suppose that a brewer—if a man wanted to start in the brewing business, and he wanted to build up a trade for himself and to do that he financed, say, a hundred men in
[fol. 161] opening saloons, and purchased equipment for them, and took chattel mortgages, just as you have testified was done, at the minute that he commenced supplying beer to these customers, what would you say would be the value of the mortgages and the trade? I mean, in this regard: Would the value of the mortgages be any more than the

actual amount that you invest, as a loan for the purchase of the equipment?

A. If the value of the mortgages was over two dollars a barrel, you mean—higher than two dollars a barrel?

Q. Suppose you invested $50,000 in opening these saloons, and took chattel mortgages for it——

A. (Interposing.) How much beer would they sell—how many barrels?

Q. Well, you do not know.

A. Then, I could not give you the value. I have got to figure the sales when I purchase.

Q. The moment you open the business up, would you say that your mortgages have the value that you have invested in them, without knowing how much beer you would sell or were going to sell?

Mr. Hyman: Do you mean the actual dollar and cents value of the mortgages, is that it?

Mr. Feldman: Yes.

The Witness: If you did not know that the beer could be consumed, or would be consumed, or would be consumed at a certain place, it would be a bad investment.

Mr. Hyman: He is asking about the dollar and cents value of the investment in chattel mortgages, and not about the value of the beer trade.

The Witness: Yes, but I looked over a corner when I [fol. 162] want to invest in a chattel mortgage, and if I do not like the neighborhood, and if it is not prospectively a good place, I will not put any money into a chattel mortgage.

Mr. Hyman: But he is asking you to suppose that you did put $5,000 into a corner place, which was secured by a chattel mortgage, and a mortgage on the lease, would your $5,000 mortgage be worth $5,000 in a week from that time, regardless of what they sold?

The Witness: Well, I can answer that "yes" and "no" also. I could not say within a week.

Mr. Hyman: Well, in any time?

The Witness: If the sales were a hundred or a hundred and fifty or two hundred half barrels a week, I would say "yes." That is, half barrels a week.

Mr. Feldman: Well, I will leave that point now. I think that is all.

Redirect examination.

By Mr. Hyman:

Q. Apropos of the last question, what Mr. Feldman was apparently getting at, Mr. Loewer, was this: You put, let us say, $5,000 into a saloon, and you advance it to the man who had a lease and was going to operate the place. What was the type of man who operated those places, so far as financial responsibility was concerned?

A. He would have to have some financial responsibility.

Q. Would you say you could go and collect the face amount of your chattel mortgages from those people?

A. No, certainly not.

[fol. 163] Q. And you also told the Court that actually you only collected about ten per cent?

A. Ten per cent, and that was a guess.

Q. So that the men who operated these saloons were financially responsible?

A. Yes.

Q. So that primarily your investment in these saloons was made for the purpose of increasing the output of your brewery?

A. Yes, and controlling the trade.

Q. He also asked you whether or not, if somebody wanted to, you could not use that plant for manufacturing bootleg beer, and you answered that he could, if he paid cash.

A. Yes.

Q. Now, as a matter of fact, is not that the only purpose for which one could possibly use those buildings?

A. That is all.

Q. That is, economically?

A. Yes.

Q. And if he cannot manufacture intoxicating cereal beverage or bootleg beer, then he can not make any use of those buildings at all, can he?

A. That is the only inquiries we have had for the purchase of those buildings.

Q. Now, you were also asked a question concerning the value—the increase in value. The increase in the value of

your property was increase in the value of the land, was it not?

A. The land, yes—the neighborhood.

Q. Actually your buildings have decreased in value, have they not?

A. Certainly they have.

Q. From year to year?

A. Yes.

Q. Would you say that that real estate would be worth more with the buildings off it or on it?

A. It would be worth more if the buildings were off of it.

[fol. 164] Mr. Feldman: I move that the last question and answer be stricken out, on the ground that this witness is not an expert in real estate transactions.

The Court: I will allow it to stand, with an exception to the defendant.

Q. To clarify his Honor's point of view on this matter, Mr. Loewer, of use of these buildings, if you could re-arrange—that is, if you could afford to re-arrange and make use of the buildings of this character for the manufacture of your output of near beer today, within what space could you confine your operations—what space compared to your whole space?

A. You mean the present-day output of near beer?

Q. Yes.

A. One-third.

Q. There is no doubt in your mind about that?

A. Positively.

Q. Now, Mr. Feldman also asked you about if the output of near beer increased. You have been trying this near beer game now for how long?

A. Eight years.

Q. Eight years?

A. Yes.

Q. Is it not a matter of record that the production of near beer in this country has steadily fallen off from the time it was started to the present day?

A. The first year of Prohibition it was nine million barrels, and last year it was a little over four million.

Mr. Feldman: Do you still get that from the Internal Revenue figures?

The Witness: Yes, sir.

Mr. Hyman: That is his business, Mr. Feldman, and he certainly knows that.

[fol. 165] The Court: You may put in anything to the contrary, if you have it.

Mr. Feldman: All right.

The Court: What has taken the place of it?

The Witness: I think it is ginger ale—if not something else.

(Informal discussion off the record.)

Mr. Hyman: I think that is all, Mr. Loewer.

Recross-examination.

By Mr. Feldman:

Q. I just wanted to ask you, Mr. Loewer, about the leases that were taken by the various saloon keepers, and which were assigned to you upon your giving them a chattel mortgage or upon their giving you, rather, a chattel mortgage for the investment; how long would those leases ordinarily run?

A. They were originally probably made for three or five years, with a renewal clause.

Q. With a renewal clause?

A. Yes. Some of them were made to run for three years only.

Q. Have you had many of those leases after Prohibition went into effect?

A. We had a mortgage on them. We never had an assignment of the lease.

Q. Did the mortgage on the lease have any value as security?

A. It did, and it had a great moral effect over the saloon keeper, because he figured that we had the right to go in there and put him out.

Q. After Prohibition when that saloon keeper could no longer buy beer from you, did you ever realize anything from this security of the mortgage on the lease?

A. We realized from the chattel mortgage itself, when [fol. 166] a man came to make a settlement with us.

Q. That is, the chattel mortgage on the lease?

A. No, a chattel mortgage. If we loaned a man a thousand dollars, we had a chattel mortgage and a note for a thousand dollars, and a mortgage upon the lease as collateral security. If he came, after Prohibition, and wanted to settle that mortgage, and he was financially fairly well situated, he would probably try to settle with us for, say, $500 or $750.

Q. Is it not a fact that these leaseholds went up in value, and were of considerable importance in settling the debts covered by the chattel mortgages?

A. No, not on saloon properties in side streets.

The Court: We will take a recess here until two o'clock.

(Recess.)

Afternoon Session, 2 p. m.

JACOB LOEWER resumed the stand.

Recross-examination continued.

By Mr. Feldman:

Q. Now, Mr. Loewer, did I understand you to say that the buildings, these brewery buildings, had no value apart from the land?

A. That they had no value?

Q. Apart from the land upon which they stand?

A. No, I did not say that. The buildings have a value, and the land has a value also.

[fol. 167] Q. Yes. I thought I understood you to say, in reply to one of Mr. Hyman's questions, that the land has a greater value with the buildings off it than with the buildings on it?

A. Naturally it has.

Q. Why do you say that?

A. Because the buildings can not be used for any other purpose.

Q. Any other purpose than what?

A. For any other business but for the brewing business.

Q. They cannot be used for any other business than the brewing business?

A. No.

Q. However, they can be used for brewing purposes?

A. Yes, sir.

Q. They can be used for cold storage too?

A. Well, when I say "brewing", I mean brewery purposes and cold storage.

Q. They could be used for the manufacture of soft drinks, such as ginger ale and soda waters, and such things?

A. No, sir.

Q. As matter of fact, have not some of the brewers in this city engaged in that business?

A. Unfortunately some of them tried it, yes, but they are not in it any more.

Q. Why did they try it? They tried it because they could make soft drinks?

A. On the ground floor, yes.

Q. And the reason they discontinued was probably because they did not have enough business, is not that right?

A. Either that or it did not pay.

Q. But they could make soft drinks?

A. Oh, yes.

Q. And they could make ice cream there?

A. Yes.

Q. And they could use the plants for those purposes, among others?

A. The ground floor you could, yes.

[fol. 168] Q. Well, they could use parts of all the buildings for those purposes?

A. Not advantageously, no.

Q. By "advantageously" do you mean that if they did not have enough customers, they might not be able to make a profit?

A. No. A bottling concern needs space on the ground floor particularly. The upper floor or two is only used for the storing of unused or broken boxes, or stock for empties.

Q. You have testified that these buildings are of very sound construction?

A. Yes, sir.

Q. As a matter of fact, were not the walls of the brewery proper at least twice as thick as the walls of an ordinary buildings?

A. We have walls, I believe, two and a half feet thick at the foundation.

Q. Very substantial?

A. Yes, solidly constructed.

Q. And a brewery building constructed like that would be expected to last much longer probably than an ordinary brick building?

A. I cannot answer that for every brick building.

Q. Well, as a matter of experience, do you know of breweries having been up for at least fifty or a hundred years, constructed like yours?

A. No. They only started brewing in 1860 in the United States virtually.

Q. Then, some of them may have been up since 1860. Do you know of any of that kind?

A. No. Ehret was one of the oldest. I think he went in the business in 1867—Ehret and Ruppert.

Q. And his building is still standing?

A. Not the original brewery, no.

Q. Did he enlarge his plant?

A. He certainly did.

[fol. 169] Q. Could those buildings be used as a garage?

A. Could they?

Q. Yes.

A. The ground floor—which we are doing now—of the brew house.

Q. If you put elevators in, could you use the upper stories?

A. No, sir.

Q. Why not?

A. Because there is not more than about ten foot head room between the girders in the floors. Because of the small distance under the girders, and the columns. You only have about ten foot head room, and you could not move vehicles through a place with only ten foot headroom.

Q. You mean the distance between the floor and the ceiling?

A. Between the girders; yes, sir.

Q. Well, could they be changed around so that you could make greater head room?

A. By ripping it all out; yes.

Q. Yes.

A. Which would cost as much, perhaps, or more than a new building.

Q. You could use the ground floor, though?

A. Only in the brew house, where we have 20-foot head room. Not in the ice houses, where there is only 12 or 12-foot head room.

Q. What is the name of your cold storage company?

A. The Loewer Cold Storage Corporation.

Q. The Loewer Cold Storage Corporation?

A. Yes.

Q. Have they been filing income tax returns?

A. Each year, yes.

Q. When was it organized?

A. I think in 1920 or 1921.

Q. And they have filed income tax returns?

A. Each year.

Q. Each year since that time?

A. Yes, sir.

[fol. 170] Q. Did they show a profit?

A. No, sir. They showed a loss each year.

Q. You said something about negotiations that you had with people about selling your brewery?

A. Yes, sir.

Q. For the purpose of making bootleg beer?

A. Yes, sir.

Q. Were those negotiations for the purpose of selling the brewery outright?

A. Yes, sir; the entire plant—machinery, fixtures and everything.

Q. What was offered to you for it?

A. What was offered to me?

Q. Yes.

A. We fixed a price that we wanted.

Q. What price did you demand?

A. On the 22 lots?

Q. On the whole brewery property?

Mr. Hyman: Do you think that is material?

The Court: I will take it, with an exception to the plaintiff.

A. On the brewery and the realty company property, which comprises 22 lots, we asked a million and a half.

Q. I do not understand what you mean by the brewery and the realty company.

A. The bottling establishment is on the other side of 41st street, and since Prohibition the Loewer Realty Company owned that property. They could not use the brewery company's own property on the north side for bottling purposes, so we leased from the Loewer Realty Company the buildings from 40 to 41st Street, and put our bottling machinery in there, which we could only conduct on other properties not belonging to the brewery.

[fol. 171] Q. Tell me about this Loewer Realty Company. Is that another subsidiary owned by the same parties?

A. There are three corporations, yes.

Q. That is, the storage corporation——

A. (Interposing.) The realty company and the brewery company.

Q. And the realty company and the brewery company?

A. Yes, sir.

Q. Did the realty company own this property prior to Prohibition?

A. Yes, sir; from 1906, when we acquired the property.

Q. Which property did it acquire?

A. On the south side of 41st Street from the north side of 40th Street.

Q. What property is owned by the brewery company?

A. The seven lots on the north side of 41st Street.

Q. Other than that owned by the realty company?

A. Yes. Three lots on the south side of West 42nd Street, and three lots on the south side of 41st Street.

Q. Now, you say that negotiations were had as to all of the property owned by all of the companies as a single unit?

A. These people asked me what we wanted for the brewery, and we could not sell the bottling department away from the other side, because it would be like amputating your body. In other words, to operate it as a brewery, you must buy it all. You cannot let it be divided, because if we sell the brew house property we will only have the bottling left, and we cannot bottle without the brewery, and cannot brew without the bottling department.

Q. And you demanded a million and a half dollars?

A. Yes, sir.

[fol. 172] Q. For the land and the buildings on it?

A. Yes; 22 parcels of land all built up.

Q. Did they tell you what they wanted to use the property for, if they purchased it?

A. They said they wanted to continue in the brewing business. I could understand what that meant, and they wanted to know how much cash, and I said, "One hundred per cent cash."

Q. Did you have any negotiations with more than one or with just one?

A. Well, there have been two or three people in to see me about the same subject, but this one gentlemen is prominently known in the United States, and I can give you the data right here.

Q. Well, I do not care to know about that. There were two or three of them?

A. Yes.

Q. Now, can you tell me, Mr. Loewer, about the use to which some of the breweries in this city and elsewhere were put, subsequent to Prohibition?

A. Yes, sir. The Elias Brewery went into the candy business for two or three years, and then quit and sold their plant, and it is torn down. Bloomingdale has it now.

The S. Liebman Brewery, in Brooklyn, went into the chocolate candy business, and gave that up.

The Frank Brewery, in Brooklyn, went into the canning industry, and that lasted for two years, and now that is closed up.

The Lion Brewery are making dye colors, and so is the F. & M. Schaefer Brewery, in Brooklyn, making dyes, in conjunction with their brewing operations.

Q. They are still in the business?

A. Principally in the dye business.

[fol. 173] Q. Well, you mean they are still doing some brewing?

A. Yes. The Lion Brewery is selling less than we are; and in 1918 they were selling five times what we were selling at that time.

Q. Is there any reason why some other dyer or dye manufacturer, who had a sufficient business, could not set up a dye business in your brewery?

A. They brought somebody over from Germany—one of these chemists—and it is really a patented article, since the

war, and that is why they have set it up, on account of the tariff and everything being changed against the German dyes.

Q. My question was, is there any reason why your brewery could not be adapted to the dye manufacturing business?

A. It is probably my unfortunate position that they did not apply to me.

Q. If a dye manufacturer happened to need a place to manufacture dyes, he probably could use your brewery?

A. I don't know. I don't know anything about the dye business.

Q. Will you say he could, in view of the fact that a dye manufacturer is using this other brewery that you were talking about?

A. The Lion Brewery and Schaefer have a great many buildings outside of their breweries, adjoining them—such as stables and other buildings, which they use for that purpose. We have not.

The Court: I understand the Anheuser-Busch people use their plant for the manufacture of ice cream.

The Witness: But they do not get it from St. Louis. They make it in their depots, the same as Pabst makes cheese.

[fol. 174] Q. Where is your property? On 42nd Street and——

A. (Interposing.) From 40th to 42nd Street, between 10th and 11th Avenues.

Q. Is there any demand for property in that locality?

A. Well, we have some inquiries.

Q. Is there any building going on there now?

A. No, not in that section. East of 8th Avenue, and it is coming now down between 8th and 9th Avenue.

Q. Is that a business section entirely?

A. 42nd Street?

Q. Yes.

A. Tenement houses and factories and business.

Q. I mean the locality where your brewery is.

A. Tenements where our brewery is—all tenements.

Q. Was there any building going on there during 1918 and 1919?

A. No. The building operations west of Broadway, between 34th and 42nd Street, have only started up since the 8th Avenue subway construction began, and then it got very active.

Q. Before Prohibition, you said you had a very small amount of customers who bought your bottled goods?

A. Yes, sir.

Q. Did you have any control over them whatever?

A. No, no control over bottled beer customers.

Q. Did your Brewers' Association have any rules about one brewer taking those customers away from others?

A. No.

Q. In other words, you were free to sell to whoever you wished?

A. Yes, sir.

Q. Did that trade have any value at all?

A. No, sir.

[fol. 175] The Court: There is no claim in regard to that?

Mr. Hyman: No.

Mr. Feldman: It is not of very much importance, except I think there is some question—I don't know how much—as to whether the method of proof that they claim here is proper.

The Court: But they have not included this bottling proposition in their intangibles. They have excluded it entirely. What is the use of considering that?

Mr. Feldman: All right. I will not proceed on that line any further. That is all.

Redirect examination.

By Mr. Hyman:

Q. Mr. Loewer, those illustrations or examples that you gave here were cases where these brewing companies, which could no longer manufacture beer, were attempting to turn their plants to some other use?

A. To some other use, yes.

Q. And one of them that you mentioned remained in business for about three years? I think it was the Elias Brewery. Is it not a fact that they were only in that business for about six months?

A. In the candy business, I said.

Q. I thought you said about three years.
A. No.

The Court: Well, that does not matter.
Mr. Hyman: No, I don't think it does.

Q. Now, in answer to Mr. Feldman you said that this plant did not lend itself to any of these general operations, and that nobody has ever made an offer for your plant [fol. 176] for them, except so far as you had negotiations with one party?
A. That is right.

Mr. Feldman: He said there were three or four.
The Witness: I said two or three others.

Q. The others were inquiries, I gather?
A. Yes.
Q. And only one was really important?
A. Yes.
Q. Now, your walls, Mr. Feldman brought out, were unusually thick walls?
A. Yes, sir.
Q. As a matter of fact, the character of construction of that building detracts from the value of your property, does it not?
A. It does, yes.
Q. And why is that?
A. On account of the columns and the size of the walls taking up a lot of space, in order to carry the terrific load to which the buildings are subjected, when filled with beer from the first floor up to the roof.
Q. And how about the question of demolition? If you wanted to sell your property, and somebody wanted to put up a modern building on that property——
A. (Interposing.) He would have to use dynamite because they were built with Dyckerhofer cement—a German cement. You cannot get a whole brick out of the walls anywhere.

Mr. Hyman: That is all.
Mr. Feldman: That is all.

EUGENE E. HINKLE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

[fol. 177] Direct examination.

By Mr. Hyman:

Q. Mr. Hinkle, what is your business?

A. Structural steel.

Q. How long have you been in that business?

A. Nearly forty years.

Q. Did you have anything to do with the construction of any of the buildings of the V. Loewer's Gambrinus Brewery Company?

A. Yes.

Q. Now, will you state to the Court, as quickly and succinctly as possible, the character of the construction of these buildings, which renders them different from the construction of ordinary commercial buildings?

A. The main brewery building we built in 1901 or 1902. It was built especially for the brewing business, with very heavy walls, heavy floors, heavy floor construction, and with a great many openings in the floors, where vats were put in, two, three or four stories; and it was all built at different levels—a great many different levels. There is scarcely a floor that runs straight through. It was designed as one of the best and most up-to-date equipped breweries, and for that purpose I think it is one of the best that I built.

Q. Now, does that building, by the very nature of its construction, lend itself to any other purposes?

A. Not economically.

Mr. Feldman: I object to the answer, and move that it be stricken out.

The Court: No, I will allow it to stand, with an exception to you.

Mr. Feldman: I object to it on the ground that this witness had not been qualified to answer whether or not there [fol. 178] is any other business to which this building could lend itself.

The Court: Well, it is just his opinion. He knows something about buildings.

Mr. Feldman: Exception.

Q. Have you built a number of buildings?

A. Yes, thousands of them.

Q. And you are familiar with the construction of a variety of buildings?

A. Yes.

Mr. Hyman: That is all, Mr. Hinkle.

Cross-examination.

By Mr. Feldman:

Q. Did you say that these buildings could not be used for any other purposes?

A. I said not economically used.

Q. Just what do you mean by that?

A. Well, I built practically every—pretty nearly every class of building during my forty years of experience or nearly forty years of experience—to be exact, since 1890, and I have had experience in knowing what type of building can suit a certain purpose. This building could be used for a great many things, but not in my opinion economically, because it would cost too much to reconstruct it for most any kind of business, except this brewery business.

Q. Do you refer now to the brewery proper?

A. Yes, the brewery proper.

Q. To what particular building in this brewery plant do you refer as not being susceptible——

A. (Interposing.) I am referring on that now to the main brewery building.

Q. Where the brewing is done?

A. Where the brewing is done, yes.

[fol. 179] Q. How much about the other buildings—the ice houses?

A. I think we built most of them.

Q. Are they susceptible of any other use, other than as a brewery—part of or as a unit in a brewery?

A. Not from any economical standpoint, in my opinion.

Q. Could they not be used as cold storage warehouses?

A. Yes, but the question of economy there would come in too. Some of the floors there are low, and some are very high. To refrigerate a very high ceiling room or a high story, you could not pile it so high, and you would be cool-

ing all that space, and it would be uneconomical and wasteful.

Q. Do you know, as matter of fact, that the four ice houses of this plant are being used as cold storage warehouses?

A. I know that some of them are, and some of them have been. Mezzanine floors have been put in, and they have been turned to the best use they could be.

Q. How about the boiler house? Can that be used still for any other purpose?

A. Well, it could be used—you mean, for any other purpose than for a boiler house?

Q. Then as a unit in a brewery plant?

A. Oh, yes; it could be. The question there would be how economically it could be used. You can use almost any building for something, but it is a question of economy.

Q. You do not know of any economic use to which you could put the boiler house, except as a unit in the brewery business?

A. I can not say now that I do, no.

Q. How is the boiler house constructed? Is it a one-story building?

A. Partly so.

[fol. 180] Q. Partly a one-story building?

A. Yes, partly a one-story building. It has some galleries in it.

Q. Could it be turned into a warehouse at all?

A. Yes, it is possible to do that.

Q. Could it be used as a garage?

A. I doubt—Yes, it could be, but I doubt if it could be used economically.

Q. You do not know, as matter of fact, that it would not be economical, do you? Have you ever tried it?

A. It is my judgment that it could not be so used.

Q. Why is that your judgment?

A. Well, in the first place, to use it for a garage, they can only use one floor, and you could not get rental enough to justify a garage on such an expensive piece of land. In that location a one-story garage would not pay. It would not be even a taxpayer.

Q. Could it be used or turned into a manufacturing plant of any kind—a small manufacturing plant?

A. Yes.

Q. A man with the proper business backing and with proper customers and proper experience might be able to make some sort of manufacturing establishment out of it, and make money out of it, is that not right?

A. That I cannot answer, whether he could make money out of it or not.

Q. Well, you stated——

A. (Interposing.) I would not want to try it.

Q. What is that?

A. I say, I would not want to try it. That is my judgment, and I say I don't think they could.

Q. Do you say that you do not want to answer that, or that you do not think you could make any money out of it?

A. I doubt if they could.

Q. You heard Mr. Loewer's testimony about a dyer com- [fol. 181] mencing business in one of these brewery houses?

A. Yes.

Q. Do you not think that a similar establishment could be set up in one of the brewery buildings here, or in the boiler room, and if the business was large enough, to use all the rooms?

A. The dye business is something new in this country, and I am not as familiar with it as I am with other kinds of business.

The Court: I do not think you are going to get anywhere with examination on this line, Mr. Feldman.

Mr. Feldman: All right, your Honor. I will stop.

Redirect examination.

By Mr. Hyman:

Q. Of course, a man who wanted to take loads of wood and put them on the floors there for storage could do that, could he not.

The Court: Never mind answering that.

Mr. Hyman: All right. It is perfectly obvious, of course. That is all.

Mr. Feldman: That is all.

JOHN PHILIP VOELKER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hyman:

Q. Mr. Voelker, what is your profession?

A. Architect.

[fol. 182] Q. Have you had any experience with laying out plans for the construction of brewery buildings?

A. I did, yes.

Q. How long have you been an architect?

A. Since 1886.

Q. Do you know anything about the plant of the V. Loewer's Gambrinus Brewery Company?

A. I do.

Q. How many times have you seen it?

A. Oh, I have been in there since 1911 very often.

Q. You did not have anything to do with the construction of the plant, did you?

A. Yes. I had charge of two or three alterations there.

Q. Now, using your plans and drawings if you choose, give us or give his Honor a complete understanding or explanation of the character of construction here, particularly with an idea of explaining the peculiarities and irregularities of construction, as indicative of the impossibility of putt-ng these buildings to other commercial uses?

A. The brewery proper is on land on the north side of 41st Street, and occupies 175 feet front by 98 feet 9 inches in depth. It is a number of buildings, which have been built probably one after the other, and attached with intermediate walls.

I will start with No. 521, which is a 5-story building. The cellar is about 54 feet deep. The first story is the same depth, and has the machinery for putting on hooples on the barrels; and the second story is a machine shop, and that extends in about 25 feet further back than this first story. That floor is reinforced by placing extra heavy 15-inch beams, to place an electric generator—a Ball Erie electric generator in there. To get to this rear part, which is practically over the boilers, it is something like three steps up. [fol. 183] The floor above this floor is also of steel beams,

and extends that same 25 feet further back. That is used for rough storage. That is the first, second and third. The other two stories are the same. The roof is of wood construction. The roof and the fifth floor is of wood construction.

There is a boiler house back of this building, and partly back of the brew house. The boiler room is 44 feet 4 inches by 48 feet 7 inches, and there is an extra high story, containing four boilers, with a passageway at the back for cleaning, and the smokestack is there also; and on the northeast corner of this space there are stairs leading from the lower or cellar floor, we will call it, up to the first story.

The second story of this is where I have stated before about these steps leading to this room. There are two refrigerating machines, and one electric machine. There is a space there which was probably used for an airshaft for the boiler room, that I altered and closed up, and made into a pump room.

Above this engine room, which is a very high story, is one story that contains the condensers, and above that is the roof, with tanks.

Now, Nos. 523 and 525, the frontage is about 48 feet. The cellar is occupied by a racking room for storage.

The first story is now used for storing electric cars.

Above that is a sort of semi-mezzanine, containing two cookers, where the beer is cooked. This runs through into another story—into the second story.

[fol. 184] The second story, above that, where the cookers are, has a mezzanine story on the north side. On this mezzanine is where the mash tubs are placed.

Around this brew house floor there is a platform running all around the three sides, leading to a story back—at the back of practically the mezzanine story, where the mash tubs are.

About that there is the same area, with a number of hot-water heaters and other heaters and tanks, and I think they have a hop scale there or the malt scale there; and above that are still more tanks for water and heating; and the roof tier has on one side what they call a Baudelet Cooler.

The beer is pumped up from this ground floor, where the brew kettle is, up to this Baudelet Cooler, where the beer is cooled off.

Then, they have a clock power up there, where they have some more steel tanks for water.

Back of this brew house is the washroom on the ground floor. That has a row of columns through the center of it, in that 24 foot space, making practically only 12 feet on each side of the columns. The floor above is reached from that brew house to another engine room there, and there are two engines in there, and it has the malt bins in it.

From the malt bin floor to the brew house floor is at least five or six steps—lower than the malt floor.

Then, this building has—continues with these malt bins, and goes practically up to the roof, and on one story they have the mill room for grinding the malt. Of course, they have bucket-elevators on that, which take the malt up, and throw it over and back and forth; and on the roof there is nothing.

[fol. 185] The adjoining building I altered by putting a partition between the brew house and this building, which is practically one room, 27 feet 10 inches, between the two walls.

The full depth of the lot is 98 feet 9 inches. In this building I placed an elevator in the southeast corner, and stairs to the cellar, close to the front, and a small office. This room is used for refrigerating purposes. That floor is practically on the same level with the brew house floor and has a row of columns through the center, and they are about 18 feet from center to center of the columns, going north and south, east and west about 12 feet centers.

To get to No. 529 there are three or four steps up to that level; and this is another building about 25 feet 8 inches, with a center row of columns between the walls, extending half way, with a step leading up to the rear half, and stairs from there up through the building. This has a row of columns, and there are seven bays in that 98 feet, about practically 14 foot centers. So on each side of the columns there are about 12 feet of space; and this floor is at least 4 feet above the sidewalk; I mean the first floor of that building. That building is occupied by gas collectors and beer storage and big tanks. The upper stories are practically turned into cold storage. That has a dividing wall half way through, going east and west. The roof is wood construction, and on top of this roof is what they call the

water cooler—the Wheeler, I believe the name of it is—about 20 or 30 feet high, which practically covers a space of about 22 feet in width and about 35 feet long, north and south. This is resting on girders and on the columns from below.

[fol. 186] Adjoining No. 531 is also a five story building, with eight spaces north and south, which makes about 12 foot centers. The building is 22 feet wide, with rows of columns through the center, which makes the space between the walls and the columns about 11 feet wide, and the building is also four or about four feet above the sidewalk on the first story.

The cellar is used for Government tanks, and the first and second stories for beer storage.

These three buildings are practically what we call the ice houses. I would call them refrigeration rooms.

Then, there is No. 533, that is a similar building, and in this building something was said before about the extra high story. I put a tier of beams in through that, creating a new story, making each story about 11 feet high. Above that is used for storage. In this building there are seven bays, which makes it about 14 feet centers, with a row of columns in through the center, running north and south, making the space between the columns and the wall about 12 feet.

All these buildings are practically fire-proof construction except the roof tier, which is of wood. The floors are concrete and asphalt. The walls are—numbers 533 and 531 are of peculiar construction, in this way: to insulate the walls they built a four-inch wall between that and the original wall of the building, and that wall space is filled in with pitch. That makes the best insulation, where nothing can pierce through it. That is even better than cork. A part of that *is* practically used for storage also.

The only building that could be used for a garage is that [fol. 187] brew house and No. 521, because that is level with the street. All the others, there is no floor from the ground floor up to the roof that is level with another floor. They are all up or down—up and down. On the first story of all buildings except No. 521 there is a difference of about two feet up and down. Each building has a separate height, of those three buildings. In No. 531 on the second story there

is a depression which still makes it of different stories. The brew house story is practically level with the room adjoining it. The second story has a depression, and in the brew house the floor, where I said above the mezzanine story, is at least four or five feet higher than the adjoining ones, which still have each floor on a separate level.

No. 531 has a depression again lower than the other three. The third floor, that is where that mezzanine story came in on the brew house. The other stories have got various heights, from one foot or two feet or more; and in the No. 533 building there is a height there at least of five feet above the others. The fourth story is level—Nos. 523 and 525—is level, and all the rest are on different heights of from one to three feet, and the fifth story is practically the same. There are no levels that are alike. The roof is also all different levels. The roof is tar and gravel.

In this one building, No. 529, there is a small elevator, and a narrow staircase about two feet wide, that leads from the ground floor up.

In No. 531 there is a little staircase in the rear—say, about 80 feet from the front. It is a winding stair-case in No. 533, from the cellar to the fourth story. As I said be- [fol. 188] fore, the building is practically of fire proof construction, with brick walls and cement, and the insulation—that is, Nos. 527, 529, 531 and 533, those buildings are lined with cork insulation for refrigerating purposes—for cold storage.

Q. These buildings, as you have described them, were built, were they not, without regard to any possible other use?

A. I do not see how they could be, unless you spent a pile of money on them.

Q. You say "a pile of money"?

A. Yes.

Q. What do you mean by that?

A. Well, I would prefer to put up a new building for the same amount of money.

Q. In other words, when you spend a great sum of money for reconstruction, you would still have an old building on your hands, is that the idea?

A. Yes, that is right.

Q. Now, these various staircases that you have described, are placed there, are they not, for the convenience of the brewing business; that is, for the operations of the brewing business?

A. For that purpose only, yes, and they are of wood.

Q. Of wood?

A. Yes, except that one circular stairs, and that is iron.

Q. Has the building no regular set of staircases from cellar to roof?

A. From cellar to roof?

Q. Yes.

A. No.

Q. And no regular sets of elevators?

A. There are two elevators. They go from the cellar to the roof.

Q. Where are they placed?

A. The new one is placed in the building No. 527 at the front. The old one was there as long as I can remember, and is in building No. 529, about the center of the house.

[fol. 189] Q. What kind of elevator is that?

A. Well, it is not up-to-date.

Q. How does it work? By hand with a rope?

A. By manual lifting. The other one at 527, the new one, is practically electric power, overhead.

Q. Did you say that practically all the floors of that building were about four feet above the street—of those units?

A. Nos. 527, 529, 531 and 533 are, say, from three to four feet.

Q. And all the ceilings and floors of the others are of different levels?

A. All through the house.

Q. Mr. Loewer has told me that when you came to laying out the bottling plant, you could not use any of these buildings for that purpose.

A. It would be a waste of money to try it.

Q. Would you say that if you were to demolish those buildings, there would be any salvage value in them?

A. Not today, any more. They would have to pay to have the building taken down.

Q. In other words, it would cost them money even for their removal?

A. Yes, it would cost a good deal of money.

Mr. Hyman: That is all.

Cross-examination.

By Mr. Feldman:

Q. It is true, is it not, that it costs money to wreck any building?

A. What is that?

Q. I say, it is true that it costs money to wreck any kind of building?

A. That is right, certainly.

Q. It does, does it not?

A. Yes, of course.

Q. Did you have anything to do with the construction—the original construction of these brewery buildings?

A. No.

[fol. 190] Q. Do you know what they cost to build?

A. What is that?

Q. I say, do you know what they cost to build?

A. Originally, no.

Q. You do not?

A. No.

Q. It would be possible to put new floors in these buildings, would it not?

A. By ripping the old ones out, yes, and all the columns out, and then your walls would not be strong enough to take the load to make a floor for any manufacturing purpose. A building only 25 feet in width should not have a column in it—and all these buildings have columns in the center. It makes it uneconomical for any business.

Q. What kind of columns do you refer to?

A. In each one of these buildings there is a row of columns that go through the center.

Q. From the floor to the ceiling?

A. Yes, supporting the floors above by griders, with columns from the cellar right practically up to the floor below the roof.

Q. What is the objection to those columns?

A. Well, there is no space left—not enough space. There is too much room occupied by the columns.

Q. But it is possible to make new floors by putting those columns in?

A. With those columns in?

Q. Yes.

A. How could you do that? Is that your question?

Q. No, but I say it is possible to make new floors with those columns in there?

A. You could do it, yes.

The Court: The columns are in there already?

The Witness: Yes. You could not use those columns, if [fol. 191] you put new floors in. Those columns now support a set of griders on each floor, on the levels where they are now. If you make all the floors level, you would have to take those columns out, and put in new columns. Otherwise, you would have a terrible mess.

Q. Is it not a fact that in order to put new floors in, you would simply have to substitute one set of columns for another?

A. Yes.

Q. And there would not be any less space in the building?

A. No less space than there is now, no. Those buildings are figured to carry a certain load——

The Court (interposing): I think perhaps you did not catch counsel's point. The present spacing of those columns is not such as to make it impossible to put new columns in there?

The Witness: No.

The Court: I think there is no need of cross examining further on that.

Q. Is it possible to make new floors in there without the use of columns?

A. No. The walls would not carry it, provided the floor load that you were putting on was heavy.

Q. How thick are those walls?

A. They are of all thicknesses, from two feet four inches down to twelve inches.

The Court: Could you not put in new floors there without using those columns or most of those columns—taking [fol. 192] out the present floors and putting in new ones, and omitting the columns?

The Witness: Then you would have to figure on less floor load.

The Court: I do not mean for the brewing business.

The Witness: If you take the dividing walls between the buildings, there would be a question if that wall was thick enough, as a bearing wall for the new load. From the center of the columns, half of that load now is over on another wall, and the same way on the opposite side. If you create a double load, it is a question if they would be thick enough to carry the load. The foundation below the foundation wall, we generally make that anywhere from six inches to whatever we need. In New York they allow you, on good sand soil, four tons to the square foot. On rock it is as high as 15 tons per square foot. Here in some places we have rock, and some places it is flush, where you cannot use any more than two tons to a foot. In some places there I think they went down with piles to get to a good footing.

Q. Is it not the fact that these walls are thick enough to support new floors all the way through without the columns at all?

A. No, I would not say so.

Q. Would they support floors that were substantial enough to carry on a lot of manufacturing businesses?

A. A light business, of about 80 tons or something like that. That might be, yes.

[fol. 193] The Court: What is the specific use that you have in mind that they could be put to, Mr. Feldman? If you have not anything specific in mind, I think it is useless to cross examine him on that. If you have anything in mind that you think they could be used for, you may ask him about it, and give him a chance to tell us his views, and then you may put on your expert, and I will determine which is the more reliable. But we will never get anywheres if you have not a specific use in mind, just cross examining in the dark, as it were. It is just a waste of time.

Mr. Feldman: That is all.

Mr. Hyman: That is all.

The Court: Just step up here again, Mr. Loewer, please.

JACOB LOEWER recalled by the Court.

By the Court:

Q. Is it not a fact that some time shortly before Prohibition a new method of brewing was evolved, requiring only a day or so in which to make fairly good beer?

A. High-powered beer?

Q. Ordinary beer.

A. You don't mean Prohibition beer?

Q. No, not Prohibition beer.

A. No, sir. The least amount, as to the age of the old-time beer, was three months.

Q. Well, that was the regular brewing method, but was there not a system evolved whereby within forty-eight hours you could artificially age beer?

[fol. 194] A. Your Honor, you can not ferment beer under nine to eleven days for fermentation alone. Then it goes to rest casks for storage.

Q. But was there not some way of avoiding that rest cask storage, by having the beer treated in some way or other artificially? A. There was a way for near-beer only, by checking the fermentation.

Q. No. I mean for regular beer.

A. No, sir.

Q. There was nothing of that sort?

A. Absolutely not. You could not make good regular beer that way.

Q. I am not saying the best beer, but I mean the ordinary beer which would now be regarded as good, even though it were not of the highest quality in pre-Prohibition days?

A. There was only one invention, and that was probably about three or four years prior to Prohibition, which was called "Carbonizing"—a carbonizer.

Q. And what did that do?

A. It allowed you to get rid of beer possibly two weeks earlier than the other method. In other words, it took four to five months to turn out a glass of beer that was carbonized.

The Court: All right. That is all.

STEPHEN T. DELAMATER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hyman:

Q. Mr. Delamater, what is your profession?

A. I am practicing consulting engineering in the City of Washington.

[fol. 195] Q. Will you please state what your education and experience has been?

A. I was educated as a civil engineer at Cornell University, and for some three years I was with the Osborn Engineering Company, of Cleveland, Ohio. With them I was on design of buildings, estimates of costs of buildings, and I superintended the erection, as engineer in charge of construction of three manufacturing plants one located at Franklin, Pennsylvania; one in Lima, Ohio, and one in Bedford, Indiana. Some ten years following I was with various Chicago contractors, preparing bidding estimates on buildings of all classes and kinds throughout the country. That was from large size office buildings down to small alteration or repair jobs.

For four years I was with the firm of architects in Chicago known now as Graham, Anderson, Probst & White—probably the largest firm of architects in the country. It was formerly known as D. H. Burnham & Company. With them I was an appraiser, determining the values of changes in buildings, as between owners and contractors.

I was also for a time in private practice as a civil engineer and consulting engineer, principally on appraisal work, in the City of Chicago.

At the time of the war I was at first in a civilian capacity in the construction division of the Quartermaster Corps, and made various studies of an engineering character, one of which being an estimate of cost and the feasibility of reconstruction of some of the tent camps into brick or mill and wood construction; and I also made a study and estimate of cost of constructing army hospitals in two and three story designs.

[fol. 196] I was later commissioned as an officer, and I was in charge of the maintenance and repair of buildings at

all the army posts, and took over as completed the same work, in connection with some of the cantonments or camps which were built at that time.

After being discharged from the Army, I entered the service of the Government in the Internal Revenue Bureau, the Income Tax unit, as an appraisal engineer, in what was known as the amortization section. From appraisal engineer, I was advanced to chief engineer of that section, and later became chief of the section.

Q. What section is that?

A. The amortization section, and for three years I was chief of that section. Since that time I have been in private practice as a consulting engineer.

Q. As chief of the amortization section of the Income Tax Department of the Bureau of Internal Revenue, was it not your duty to pass on questions similar to that which I have asked you to come here for?

A. Yes.

Q. That is, as to the value of buildings, and the residual value of buildings and equipment?

A. Well, as appraisal engineer, I first was handling the details of such work as determining the residual values or salvage value or value in use of the plants throughout the country which were engaged in war work. Later, as chief of the section, I had entire supervision of that work,—the determining of the policy, within the law and the regulations which guided the engineers under me, in the establishment of these values; and I also, upon occasion, went into the field on some of the larger cases, and personally [fol. 197] determined those values while I was chief.

Q. In determining values for amortization purposes, it is precisely the same, is it not, as determining values for the purpose of obsolescence?

A. In amortization work we had to determine the salvage values or the value in use, and in determining obsolescence, which we at that time sometimes had cases to determine, we determined them in practically the same manner.

Q. I asked you, did I not, Mr. Delamater, some time ago to come up and make an examination of the buildings of the V. Loewer's Gambrinus Brewery Company?

A. You did.

Q. And did you make such an examination?

A. I did.

Q. When?

A. Oh, about two weeks ago, I think? Yes, about two weeks ago.

Q. Now, will you state what the type of construction of those buildings is?

The Court: I think there is not much dispute about that.

The Witness: If I may suggest that I answer by subscribing to what a former witness has testified to——

Mr. Hyman (interposing): Is that satisfactory?

The Court: Yes, entirely.

The Witness: He is an architect, and I am an engineer, and we speak the same language.

The Court: You heard his testimony?

The Witness: I did.

The Court: And you coincide with everything he said [fol. 198] he said about the construction here?

The Witness: In so far as the description of the buildings is concerned. Not his opinion.

The Court: No. I understand.

Q. Now, considering the type of construction and considering the examination that you made of the various peculiarities and characteristics of these buildings, would you say whether or not they have any value for any other purpose than that to which they were put, that is, the brewing of beer?

A. With the knowledge which I have, as a result of the inspection of these buildings, and my knowledge as gained from the inspection of a great many breweries, I am of the opinion that these buildings have no other—no value for any other use, without, as has previously been stated, great expense in alterations,—an expense which any company going into business or seeking a manufacturing plant would not undertake, in my opinion, on an old plant. They would prefer to build a new plant which was adapted to their particular needs.

Q. Now, what would you say as to salvage value? Have these buildings any salvage value, in the event that they were demolished?

A. In my opinion, they have none. It would cost money to salvage them; and I speak with my vast knowledge of

such matters in connection with bidding, which I have done on contracts for the demolition and construction of new buildings on site. It would cost money to demolish these buildings.

Q. You saw the stipulation, did you not, Plaintiff's Exhibit No. 1 (exhibiting paper to the witness)?

A. I did, yes. Will you let me look at it further a moment?

[fol. 199] Q. Yes (handing paper to the witness). I think on next to the last page you will find the figures.

A. Yes, that is it. I have seen that and am familiar with it.

Q. Would you say then, or am I correct in saying that in your opinion the total depreciated cost at December 31, 1917, was absorbed in the loss of any value to those buildings, treated from the standpoint of their actual value in material and workmanship? I do not know that that is quite clear. That seems to me to be somewhat complicated.

A. You might read it to me.

Q. Well, you are familiar with the question that is before the Court here, which is to determine the amount of obsolescence in these buildings?

A. Yes.

Q. From January 31, 1918 to January 16, 1920?

A. I am.

Q. And what I am trying to get at is this, that according to the opinion you have expressed, at whatever the depreciated cost of these buildings was at January 31, 1918, that was totally lost at the end of the obsolescence period? Is that plain?

A. That is my opinion.

Q. That is your opinion?

A. Yes.

Q. And that is because they have no salvage value, and no use for other purposes?

A. Yes.

Q. May I ask if you did not, at my request, prepare a table based upon the opinion which you have just given, showing the loss—the spread of this loss of value over the obsolescence period?

A. I did.

Q. And have you that paper with you?

A. Yes.

[fol. 200] Mr. Hyman: I would like to offer it for the aid of the Court, because your Honor would have to determine those figures, if you come to the question of the amount of obsolescence.

The Court: The entire period that you have mentioned is included within two years?

Mr. Hyman: Yes; it runs eleven months in 1918, and twelve months in 1919, and sixteen days into 1920, but with 1920 we are not concerned.

The Witness: I have two copies there (indicating).

The Court: You may mark that in evidence for whatever it is worth.

Mr. Hyman: Yes, I offer it.

(Paper marked Plaintiff's Exhibit No. 11.)

Mr. Feldman: May I enter an objection to this, and take an exception to its admission?

The Court: Yes. It is just taken not as proof of anything at all, but just as a computation.

Mr. Hyman: Yes.

Q. Now, explain to the Court how you arrived at that? You have only a few figures here. Just explain that statement, please.

The Court: It is just proportionate, is it not?

Mr. Hyman: Except to show how he got his starting figures.

The Witness: I started from the cost——

The Court (interposing): I think I understand it.

[fol. 201] Mr. Hyman: He used a different figure. I want to be perfectly fair. In this $233,000 there is a building on which we have now made no claim for obsolescence.

The Court: All right.

Mr. Hyman: So I have limited him only to the balance, which is $203,000 instead of $233,000. That is the little office. It has no connection with brewing.

The Court: I understand.

Mr. Hyman: That is all. You may cross examine.

The Witness: I have here, I believe, a table showing how I arrived at that, if you want it.

Mr. Hyman: Well, I do not think there is any question about it. It is the depreciated stipulated cost of the buildings.

Cross-examination.

By Mr. Feldman:

Q. Do you know what it would cost to build those brewery buildings today?

A. No, I have made no re-production cost estimates.

Q. This cost figure on this sheet is simply a figure supplied to you by Mr. Hyman, is it?

A. Yes.

Q. You have not used, have you, the assessed value of these buildings at all?

A. The assessed value?

Q. Yes.

A. No.

The Court: As I understand it, it is the same figure that was stipulated?

Mr. Hyman: Yes.

[fol. 202] The Court: Except for an item of $30,000.

Mr. Hyman: That is right.

The Witness: It is the depreciated cost as of January 31, 1918?

Q. Could new floors be put in these buildings?

A. Yes.

Q. And make them usable for some other purpose?

A. Yes, if you wanted to spend the money.

Q. How much would it cost to put them in?

A. I could not answer that offhand, and I have made no estimate.

Q. How, then, can you say that it can not economically be done?

A. From my knowledge of such matters, I know in a general way that it would cost considerable.

Q. Well, how much?

A. Well, which building? Where are you going to put your floors, and what are the floor loads?

Q. Take the brewery building?

A. I cannot answer that offhand, because it would require computation.

Q. But you have testified that they cannot be changed economically for some other purpose. Now, I would like to know why, and what it would cost to change them?

A. I would have to make calculations to tell you how much. It would cost a great deal of money, though.

Mr. Feldman: I move that this witness's testimony be stricken out on the ground that he does not know how much it would cost, and still he says that you can not do it economically.

The Court: I will let it stand, with an exception to you.

[fol. 203] Q. Can you give us no idea at all how much it would cost?

A. Anything that I might name would be a pure guess, because you can put floors in with seven or eight or ten or twelve or fifteen or twenty foot head room. It would depend upon how many floors you put in, and what floor loads they were designed for. I do not know how to answer your question. How many floors do you want in, and in what buildings?

Q. With ten-foot head room, with strength to hold the necessary machinery for a candy business, say, how much would it cost to put those floors in?

A. And tear out the old floors?

Q. Yes.

A. You would practically have to rebuild the building, because you would have to tear our your walls, and put in pilasters for your supporting girders, or else put in columns, and by the time you had done that, you would not have much left.

Q. How much would it cost?

A. It would cost pretty near as much as a new plant.

Q. How much does a new plant cost?

A. Well, engineers do not pick figures out of the air. I would say it might cost $100,000, and it might cost $250,000, depending on the style of plant.

Q. Do you know what it would cost to rebuild this brewery building, if you were building it today?

A. No.

Mr. Feldman: That is all.

Redirect examination.

By Mr. Hyman:

Q. It would not be built today the way it was built when it was first constructed, would it?

A. No, it would not.

[fol. 204] Mr. Hyman: That is all.

Mr. Feldman: That is all.

Mr. Hyman: That is all, your Honor, except a brewer I was expecting here, to offer his testimony in corroboration of the value of brewery trade. There is no contradiction of it anyway.

The Court: In the absence of any contradiction, I do not think it is necessary.

Mr. Hyman: All right. That is all.

Henry Oakley, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Feldman:

Q. Mr. Oakley, what is your present business?

A. I am chief of the valuation section of the income tax unit.

Q. How long have you been in that position?

A. I have been nearly two years now as chief. I have been a real estate appraiser for the income tax unit, and the Estate Tax Division, since 1918.

Q. What were your duties, as such appraiser?

A. To pass upon the values—in the Estate Tax Division, to pass upon the values of properties, as of the date of the decedent's death. In the Income Tax Division, to pass upon the value of properties as of March 1, 1913, or as of the date of acquisition.

Q. Has it been your experience in this employment to appraise real estate throughout the City of New York?

A. It has.

Q. And in and around the section of 40th to 42nd Streets [fol. 205] and Tenth Avenue?

A. Yes, all through the City of New York.

Q. And you are familiar with property in that section?

A. Yes.

Q. Have you ever seen the Loewer's Gambrinus Brewery?

A. About 27 years ago was my last experience of seeing the Gambrinus Brewery. I was taken through that brewery at that time. It seems that my father was in the hotel business—the old Surf Hotel, at Fire Island, and some people tried to sell us some beer, and I went down there, and they took me through this brewery. My idea of it is very vague.

Q. From your knowledge of the property in that section, what would you say would be the value of the buildings—the brewery buildings of Loewer's Gambrinus Brewery Company?

The Court: You have seen them since the time you have mentioned?

The Witness: Just from the outside; not from the inside.

Mr. Hyman: I think then, your Honor, that the question is certainly objectionable.

The Court: Some of these buildings have been put up in that time?

Mr. Loewer: Yes, most of it has been put up since that time.

Mr. Feldman: This witness, I think, can say that from the construction of these buildings, and the size of them, that buildings of this kind are worth today so much a square foot.

The Court: I think you had better see what he knows about it, first.

Mr. Feldman: Yes.

[fol. 206] Q. You are familiar, are you—you have heard all the testimony today by the two technical witnesses, as to the construction of these buildings?

A. Three of them, I guess.

Q. Yes, that is right, three.

A. Yes.

Q. And from their description of these buildings, and from your knowledge of the property in the neighborhood where these buildings are located, can you say or state what the value—present value of those buildings is?

The Court: Do you mean the land and buildings?

Mr. Feldman: The buildings alone.

The Court: What has that got to do with the location of the property? What is he going to give us? The reconstruction cost?

Mr. Feldman: He will give reconstruction cost mostly.

The Court: The "value" might be the market value of the buildings without the land. What is it? I do not know just what you are asking for. He could give us a figure, but I would not know what it represented.

Mr. Feldman: The present value of a building of this kind.

The Court: Do you mean the reconstruction cost of it, or what?

Mr. Feldman: When I ask him the question, he will give us the reconstruction cost of a building of this kind.

The Court: What would that convey to my mind? The amount it could be sold for?

Mr. Feldman: Yes.

[fol. 207] The Court: That is, apart from the land?

Mr. Feldman: I do not suppose it would be sold apart from the land.

The Court: Then is it the buildings alone?

Mr. Feldman: The witnesses for the plaintiff have stated that the buildings have no value.

Mr. Hyman: That is, for any other purpose.

The Court: They said that they have no salvage value and that they cannot be used for any purpose but brewing purposes. But to say that it has a value, without telling me what kind of value it is—whether it is market value or what, does not convey anything to my mind. It may be my fault, but it would not mean anything to me, unless you define the word "value". There are different kinds of value, of course. Take in these rate cases, they arrive at value on the basis of reconstruction cost less depreciation. Now, if that is the type of value that you want this witness to testify about, you will have to get the underlying facts, as to how much it would cost to reconstruct, and how much they have depreciated, and then the value in that sense would be just a computation. Or another way of valuing real estate is the market value. I am not saying that you ought not to ask this question, but you must first let me know what kind of value you are speaking of.

Mr. Feldman: I want first to ask him what the cost of con-
[fol. 208] structing these buildings would be today.

Mr. Hyman: Of what value would that be?

The Court: I will allow you to ask him, provided he knows what the construction is, but it is rather scanty in weight—testimony of that kind—unless he has examined the buildings and knows their construction. An examination made twenty-seven years ago, of course, was very cursory, as he has stated, and he was not interested in that aspect of it then. I do not think he has sufficient knowledge of them to testify to what their cost would be.

The Witness: You know that really the cost of construction of a building may all be figured out before the building is constructed. Therefore, an architect will go in and give you a value of a building long before it is built, and an architect or engineer would be working on the plans. We have sent to us from the Dodge Agency and other agencies the cost of construction of different types of buildings in different parts of the country, and in the City of New York we make a very close study of it. And then, again, we have appraised the buildings of the Anheuser-Busch Company the Hausman Brewing Company, and the George Ehret Company, and Ruppert's and Schaefer's. We have had appraisers and engineers on those buildings, and we have been through all those buildings. We have had testimony as to the value of those buildings, and as to the question [fol. 209] of obsolescence of those buildings, and what they could be used for. The last one I was working on was the Liebman, in Brooklyn. There is only one way that I can see of arriving at a value of this brewery today, and that would be upon the ground of what it would cost to construct it today new, and then depreciate it at whatever depreciation you want to allow, back to the time of the original construction, which would be on the same basis if the building was built in 1890, and if it cost 50 cents a cubic foot—which it did not, at that time—to construct, and depreciate it at two or three per cent. down to the date at which you wish to find its value, plus the difference in the cost of construction at the time that you valued it at.

Mr. Hyman: Conceding that there is all quite correct, we are still not being helped in this inquiry. That has no probative force, on this account——

The Witness: There are practically 175,000 cubic feet in this building, is that right? I will take their figures on it.

Mr. Hyman: Go ahead, Mr. Oakley.

The Court: Where did you get that figure from?

The Witness: I took that from the measurements which have been given to me, as to the height, and the size of the property on which the buildings stand. That building would cost today to construct, according to estimates, about $400,000.

[fol. 210] The Court: Regardless of the thickness of the walls?

The Witness: That would be for a new building put up.

The Court: Well, what thickness of walls are you going to have?

The Witness: Take the walls, and they would have to be practically two feet in width at the lower part, and naturally as they go up, they would be thicker.

The Court: If they were two feet six inches at the base, it would cost more?

The Witness: Not appreciably, no. The cost would be so much—in the cost of the building it would make a very small difference. A building of this kind would cost, back in 1918, about $210,000. And we know that the cost of construction in 1920 was at its height, and it has probably gone off very little since that time.

The Court: What depreciation would you allow on these buildings?

The Witness: The main depreciation is on the interior of the building, and on account of its floors being very thick and of the construction that they are, there is very little depreciation. You would allow about two per cent.

The Court: Well, does this apply to one building, 175.-000 feet, or all of them?

The Witness: This applies to the brewery building, which is 175 x 100, the whole structure.

The Court: You have no knowledge of the kind of brick?

[fol. 211] The Witness: No.

The Court: Have you any knowledge as to whether it is fireproof, and whether there are girders or wooden beams in it?

The Witness: They have stated that this is of fireproof construction, that these walls are insulated, that part of the wall is of two layers of brick, with insulation. Is not that right?

The Court: Was the building in 1879 fireproof, too?

The Witness: No.

The Court: That is a part of it, is it not?

The Witness: I understand that this whole building—the walls of it, which is 175 feet on the street by about 98 feet deep, is the first construction, and then the other construction was made up afterwards. Is that right?

The Court: You assumed that it had wooden beams or iron beams in it?

The Witness: I assumed it had steel or iron beams, covered with cement or concrete.

The Court: Well, how many brewery buildings have you appraised in that way, altogether, in the City of New York?

The Witness: You mean as to the——

The Court: As to the value of the building?

The Witness: We have——

The Court: I mean you personally.

The Witness: I, personally?

The Court: Yes.

The Witness: The Anheuser Busch, Ehert's, Liebman's, Schaefer, and the Hausman Brewery, in Staten Island.

[fol. 212] The Court: Within what period?

The Witness: From 1920 down to about 1922 or 1923.

The Court: That is five brewery properties.

The Witness: Yes.

The Court: And where did you get the figures from in those cases? From experts?

The Witness: They had experts and affidavits by experts as to the cost of construction. I have also the data given by some of the best experts, I suppose, in the East, as to the cost of construction of all classes of buildings, from 1911 down to 1915 or 1916.

The Court: How much do you figure it costs per thousand cubic feet?

The Witness: At the present time, that building would cost you practically 40 cents a cubic foot to construct.

The Court: Do you think that building could be used for any other purpose than a brewery?

The Witness: Yes.

The Court: What?

The Witness: Why?

The Court: No. What?

The Witness: It could be used for any manufacturing purposes, where the floor space did not call for a continuous floor space. For instance, as I understand it, this building is built with different levels. There are no two levels that are alike. Therefore, to break up the buildings and make on- level floor space, it could not be done, but wherever [fol. 213] there might be light manufacturing, it could be used. There is no question as to the garage part of it. The practical demand would be more for a garage than anything else.

The Court: Would not use as a garage necessitate making over the building?

The Witness: I think not. It would mean the removing of certain boilers and vats, and such things as that.

The Court: Would the space or height between the floors be sufficient?

The Witness: The lowest floor would not be less than ten feet, and outside of a large truck, I do not know of anything that could not go in that space. That is about a 10-foot floor on that photograph (indicating).

The Court: Is that right? Is that only ten feet?

Mr. Hyman: No.

The Court: Would the difference in the floor levels make it inconvenient for a garage?

The Witness: You could store cars from an elevator. It would be hard to say about the inconvenience. It would, of course, be inconvenient to a certain extent, but the elevator would take care of that.

The Court: The elevator would have to go to each separate level—it would have to?

The Witness: Yes.

Mr. Hyman: This floor is 15 feet 8 inches, your Honor.

The Witness: Well, that is a large truck.

[fol. 214] Mr. Loewer: That is where that truck is.

The Witness: The trouble with this section, in which this property is located, is that there is no demand for any building which would call for the tearing down of this building. If the building was torn down, the land would lie there vacant. The building in itself, as it is, acts, if nothing else, as a taxpayer.

Mr. Hyman: If your Honor please, I have no disposition to interfere here, but for a man to get up there and get a lot of general observations about things——

The Court: Never mind. Can you tell me, Mr. Oakley, why the brewery buildings have been put to so little use throughout the City, if they could readily be turned into something else?

The Witness: One of the reasons is this, that the brewers have had great faith that they are going to be allowed to produce. I have heard that from a brewer——

The Court: That is, real beer?

The Witness: Yes, real beer. Now, you take the brewery of Ehret's. They are not anxious to sell that. They would not offer it for any other purpose. They are well satisfied.

The Court: Considering the small breweries—I imagine that Ehret's Brewery is perhaps in a class by itself, because of its great size, and perhaps they might want to indulge their hopes or fatuity or whatever you want to call it, but take the small breweries, if they are not turned [fol. 215] into anything else, and the testimony here is that they have not been, with but one or two exceptions, which have proved not profitable——

The Witness: Your Honor, it is only a question of whether the people who started the business in these breweries knew their business, whether they started out, especially in the chocolate business, whether they put their sales department out and really pushed the business. Did they know the business, or were they just starting in, thinking that they could use the brewery for that purpose, and simply flunked?

The Court: Mr. Oakley, would it not be natural to assume that where you have a few dozen of these plants of this sort around the City,—Some small and some large—I do not know the exact number, how many there are around the City—how many were there?

Mr. Loewer: Probably 18 or 20 in Manhattan.

Mr. Hyman: In Manhattan alone?

Mr. Loewer: Yes.

The Court: And how many in Brooklyn and Staten Island?

Mr. Loewer: We formerly had fifty odd members. Today there are three breweries in Manhattan.

The Court: Suppose you had 25 or 30 breweries around the City, would it not be natural to suppose that in the

course of eight years, that if those plants could readily be turned into uses of other sorts, for other lines of business, [fol. 216] that at least some of them would have done it? Would you not expect that?

The Witness: I would expect it, yes.

The Court: Well, do you know whether or not it has been done? The evidence here is that it has not.

The Witness: It has been tried.

The Court: Yes, but do you know whether or not any brewery has ever been permanently used for another line of business?

The Witness: I do not, and the reason for it is that where it has been tried, we do not know why it failed.

The Court: But the mere fact that one man made a failure of his particular business in a plant would not, I do not suppose, deter another man from using that plant, if it could be used for some other line of business?

The Witness: No, it would not.

The Court: So the mere fact that one or two men failed there would not mean that someone else could not be successful, and the fact that no one has tried it is an indication, is it not, that there is some inherent difficulty in using these plants for other lines of business?

The Witness: Yes; and the indication also is that the brewers are not ready and willing to allow their plants to be used for any other purpose.

The Court: Well, that, of course, applies rather more to the larger plants; but take the smaller plants, a great num- [fol. 217] ber of those were not very extensive, and would they hold out for eight years, do you suppose, unless there was a real difficulty in changing their plants?

The Witness: These small brewers, which you speak of, if they did not want to hold out, if their property was in a section where values went up, and they were willing to sell their properties, for other purposes——

The Court: Is not that quite irrelevant?

The Witness: No, I do not think so. It seems to me that they are holding on for some reason. Take, for instance, there is a brewery—I forget the name of it—down on the Brighton "L", right east of the Botanical Gardens. You know the old brewery on Washington avenue?

Mr. Hyman: Ebling's?

The Witness: Yes. Now, that is in the line of development. There is an old brewery, and still they have not sold it, although the values of land there have gone up, and they are still holding onto it. What would they hold on for? They could have gotten for their land alone more than the land and buildings cost them, and still they are holding onto it. Now, why?

Mr. Hyman: They were padlocked, were they not, Mr. Oakley?

The Witness: Before they were padlocked, I mean.

Mr. Hyman: They were using it apparently illicitly brewing——

The Witness: Well, I can not prove that.

[fol. 218] The Court: If they were padlocked, the presumption is that they were.

The Witness: That is all right for you people to say, but not me.

The Court: You do not have any doubt about it?

Mr. Hyman: Not a bit.

The Court: Have you any information as to where any of these breweries have been successfully used in another line of business?

The Witness: No.

The Court: Can you tell me of any throughout the nation?

The Witness: Oh, no, I could not.

The Court: You do not know of any place where a brewery has been able to be turned into something else?

The Witness: No, outside of, as was spoken of here, the Anheuser Busch people going in the ice cream business.

Mr. Hyman: Well, that is only a depot.

The Witness: Yes.

The Court: And the other rather limited uses which have been made of breweries?

The Witness: Yes.

By Mr. Feldman:

Q. Would you know, from the testimony given here, as to the construction of these buildings and from these pictures, Plaintiff's Exhibit No. 10, whether or not it would be possible to reconstruct these buildings in any way so that they

could be used for any other purpose? I mean economically to reconstruct them, and use them for some other purpose? [fol. 219] The Court: You have not done any reconstruction?

The Witness: No. I have been in the construction business. I was with a contracting company for about ten years. I have build concrete work and steel work, but when it comes to the construction of the upper part of a building, I have had nothing to do with that. I have been in the confidence of some of the bigger builders, and that is the only thing I have had since I have been with the Government—a kind of a school. What I have learned since I have been with the Government is more than I knew before. It is a big school, when you get into it. But when it comes to the cost—the economic considerations, and so forth, there are two different kinds of obsolescence. One is obsolescence in which you absolutely give your building up. The other obsolescence is what you would call economic obsol-scence. Economic obsolescence can not be used unless the locality in which the building is located is calling for development. Now, you take, for instance, down in lower Broadway, we may have a building that was built in 1900. Today they are putting up a different class of construction. Therefore, the tenants will go into a new building, and it will cause what we call an economic obsolescence of a good building on lower Broadway. You will see them tear down old buildings, and that is one reason for it. We have it in hotels, and in different other buildings, too. I would not say it would be advisable to go [fol. 220] into a building of this kind and reconstruct it because I do not believe that between Tenth and Eleventh avenues and 40th and 41st streets that there is any demand for any such buildings. The only building that would be called for would be light manufacturing; but there must be some value to a building, and the value of that building would be the difference between what the property would rent for if it was vacant, and what it would rent for with the building thereon.

The Court: Mr. Oakley, as a brewery, if there were not prohibition, this building would have very considerable value, would it not?

The Witness: It may not today. It was built many years ago.

The Court: Has that neighborhood over there run down so since prohibition that this building would have no value as a brewery building?

The Witness: No, not in that way.

The Court: In other words, the neighborhood is about the same as it was before prohibition, is it not, except that it may have improved somewhat?

The Witness: Yes, it has improved, I think.

The Court: So that whatever value it had before 1917 as a brewery building, it would still have, less depreciation due to the passage of time, if prohibition were not in force, would it not?

[fol. 221] The Witness: I would not say so, because the call for the manufacturing of that article today may be absolutely different from what it was in 1917. A brewery building that may have been satisfactory to use in 1910, may not be a satisfactory building today.

The Court: But now you are getting into speculation. There is no evidence of that at all. Assuming, as I must, that about the same type of building could be used today as before 1917, for brewing good beer, this building would have about the same value now—certainly no less value?

The Witness: No, no less.

The Court: Than before 1917, except for depreciation?

The Witness: Depreciation, yes.

The Court: But you nevertheless say that this building, under present conditions, is not worth reconstructing?

The Witness: When I spoke of reconstruction, I spoke in the line of practically altering it. Not so much the reconstruction, because if you reconstruct it, it is necessary then that you tear the walls down to reconstruct it.

The Court: You say that it is not even worth altering.

The Witness: No. I would say it was worth altering. Any building that has good side walls is worth altering, and the proof of that is——

The Court: Even in that location over there?

[fol. 222] The Witness: Anywhere.

The Court: Well, what did you mean when you said some time ago that you would never advise reconstruction? You mean you would never advise tearing it down and reconstructing it just as it is?

The Witness: I was speaking then upon the ground—taking into consideration an economic condition. They would have to go in there and get a certain line of business to go in. Now, would the rents they could get from these people be sufficient to pay them for putting in all new floors and the improvements that would be necessary?

The Court: You do not think it would be?

The Witness: At the present time, no.

The Court: That is, if they were to alter that building so as to put in new floors, and so forth, you do not think that it would pay them?

The Witness: I do not believe that the rents would be high enough to overcome the investment.

Cross-examination.

By Mr. Hyman:

Q. I might ask you another question along that same line: suppose you wanted to go into the garage business, you certainly would not want to go over to this place and attempt to use this building for the business of conducting a garage, when you could get so many more suitable places or buildings, where you would not have the same problems, would you?

A. That would not be the question.

[fol. 223] Q. Well, that is my question.

A. I mean as to whether you would go there or not.

Q. Well, that is important.

A. The question is, if I would not go there because the value of the land is so much less that I could afford to make the improvements rather than go over into a section where the land was high, and the cost of construction would be just the same, but the land values would be so high that I could not do it.

Q. Of course you realize that if you were constructing a building for use as a garage, it would be nothing like this building would be after you got through with it?

A. No.

Q. This would be just a make shift?

A. Yes.

Q. To make some sort of use of it?

A. It would be the use to which you would have to put a building which you were not using for its original purpose.

Q. Yes, so that is what I ask you, if a man was going into the garage business, this is the last place in the world he would want to go into, is it not?

A. Oh, no.

Q. Well, could he not choose some buildings all around him there that would lend themselves much better to his purposes than this tremendous building, which has been built on irregular lines, and which has columns running down the center of the floors every twelve feet, which he would have to rip out, to make room to use that space? All those things would mean that you would have to consider them in going into the garage business?

A. No. If I were going into the garage business, this would be one of the best propositions that I know of, for the simple reason that you have, according to the evidence given by the three engineers here, that these side walls in [fol. 224] this building are wonderfully constructed and very strong. Therefore, they would bear a very heavy weight. The girders would have to be supported in any building that is 175 x 98 feet. Therefore, by putting new floors in here, on this space where the land is of no value, you have side walls which today would cost you at least two hundred thousand dollars to put up.

Q. But they would not be put up like that today?

A. No, they would not be as strong.

Q. They would not be put up of the same construction?

A. You could not. It would be prohibited.

Q. Exactly. You would put up steel construction?

A. Yes, which would cost a great deal more money. You have the nucleus of a garage there today, which is two hundred thousand dollars a head of what you would have to pay, if you started to build on any other property around there, and it is a good location for a garage.

Q. You mean if you started to build a new garage?

A. Yes.

Q. Did you hear the testimony that these floors were four feet above the level of the street?

A. Yes. That is one floor. You mean the ground floor?

Q. Yes.

A. Yes.

Q. Four feet above the level of the street?

A. Yes.

Q. Does that enter into your calculations at all?

A. Why should it?

Q. I am asking you does it?

A. No.

Q. Do you know of any brewery plant that has been turned into a garage?

A. There has been no—I do not know of any brewery plant which is better suited for a garage than this location.

[fol. 225] Q. We are not talking about the location.

A. But you asked me about a garage.

Q. I asked you if you knew of a brewery plant that has been turned into a garage?

A. I am just giving you the reason that they have not.

Q. I am not sure that I get your reason, if you did give it. What was your reason?

A. For the simple reason that in most cases the land is so valuable that it would be prohibitive, and they have not done it for that reason.

Q. Well, that is a very good reason, is it not?

A. I should think so, yes.

The Court: Mr. Feldman, if you can get any evidence that any garage is operated now in any of these brewery properties, you can let me have it.

Mr. Loewer: I can give you evidence of breweries torn down and turned into garages.

By Mr. Hyman:

Q. You spoke of the reasons why some of these people did not convert their plants. Did you have in mind also the fact that much of their heaviest machinery, vats, tanks, cookers, and so forth, were built into the building, and run for several floors through the building?

A. If you were going to convert this building into a garage, it would be necessary to put it—I mean a modern garage——

Q. Yes?

A. It would be necessary to take those vats out, naturally, and by so doing you would take out the floors and put your floors in at the proper levels.

[fol. 226] Q. You say all that would be necessary to build a garage?

A. Yes, it would.

Q. And, of course, that would mean the destruction of all that heavy machinery and so forth that is in there? You would have to take it out and junk it, would you not?

A. Well, yes, most of it, outside of whatever copper is there.

Q. It would have to be sold as junk, anyway?

The Court: I am not concerned with that.

Mr. Hyman: But I wanted to bring out that element. There are so many reasons why they do not do it. In the first place, to make any attempt at it means the loss of all the capital assets that were in there to start with, so when you start to figure all these things out, you will readily see why any man would hold on unless there were a definite reason or purpose to which he could devote his buildings.

(Informal discussion, off the record.)

The Court: Mr. Oakley has suggested to me—and I am sure that this is relevant—to inquire how much are these buildings insured for?

Mr. Hyman: I have no idea.

The Court: Perhaps Mr. Loewer can tell us?

Mr. Hyman: Have you any mortgage on that property?

Mr. Loewer: On the brewery, no.

The Court: How much are the buildings insured for?

A Voice: For about 80 per cent. of their value—of the [fol. 227] assessed value. From 80 to 85 per cent.

The Court: The buildings alone are insured for 80 per cent. of the assessed value of the buildings?

A Voice: I think so.

Mr. Hyman: If a man is going to have his plant burned down, he certainly wants something back for reconstruction.

The Court: But if it has no value at all——

Mr. Hyman: They will insure it just the same. You can insure the contents of your house for $5000, and they do not even go up to look at it. It may not be worth five cents.

Mr. Feldman: But when you come to collect, you have got to prove what it is worth.

Mr. Hyman: You are being housed, and if it burns down, you will have to put up something in its place.

A Voice: That is the building and the contents—all of the machinery and everything included in that—movable and immovable machinery. I dare say that the entire plant——

Q. Let me put this question: suppose that a building has been—its total valuation has been used up by depreciation at the rate of 2 per cent a year, do you not think that a man insures it just the same? It is obvious, of course, that he does. A man does not quit insuring his property because there is a depreciation allowance, which, presumably absorbs its value.

[fol. 228] The Court: Is this obsolescence that you are claiming here only on the basis that your two per cent. presumably absorbs its value, but does not actually do it?

Mr. Hyman: No, but here is the idea: the two per cent. depreciation is an arbitrary figure. If you take any article which is housing you—any building—for instance, I do not know, but I should say that this very building that we are in now is very near valueless—as near as anything could be, and yet it is housing this court, and I daresay that it is covered by insurance, if the Government resorts to insurance to protect itself.

The Court: Right there you have indicated exactly the point that I have in mind: the market value of this building is nil, but it has a usable value. The Government could not sell it for anything, but it has a usable value.

Mr. Hyman: To the Government.

The Court: Yes. It is that that is insured. But you come into court and say that your place has no usable value and no market value——

Mr. Hyman: I have not said that.

The Court: Well, has it a usable value?

Mr. Hyman: I say it has a usable value, in the sense that it is being used, but I say that is not, in the law, a ground for refusing the obsolescence that has actually been taking place during a certain period.

The Court: These buildings have a value, have they?

[fol. 229] Mr. Hyman: Yes, to us, as long as we continue to use them, but the moment we stop they have none. In fact, the Board of Tax Appeals has recognized that over and over again. As matter of fact, if we had closed that

plant down and quit, we would have been allowed obsolescence on the entire depreciated value of that building. It is only because we try to hang on that they do not allow it.

The Court: If you stopped using it, then there would be no justification for insurance up there at all?

Mr. Hyman: Oh, yes, we would have to keep it insured.

The Court: I am not talking about the contents. I mean the buildings.

Mr. Hyman: I would say that we ought to keep anything insured that an insurance company will insure. It is poor business not to do that.

The Court: Because there would be a loss if the buildings burned—that is, there would be a loss in value?

Mr. Hyman: The insurance company says "we have the right either to pay you the value of your insurance or to replace the building." That is their alternative, provided there is total destruction. But, as I say, you know, your Honor—just take this desk, and theoretically its value has gone long ago, but you would certainly insure it, although under the accountant's theory, it does not have any value. That does not mean that it does not have a physical value. [fol. 230] The Court: All right, I will consider the point. You have something here of real value, or you would not insure it. You do not insure a pile of dirt.

Mr. Hyman: But your Honor can not say that I would not insure it, because I am taking these buildings purely as physical things, and they have no value for other purposes than I am using them for. Therefore, if I closed up, they would have no economic value. That does not say, however, that the brick and mortar would not have value, if I could get it out. But the trouble with the matter is that the experts say that it would cost more to try to salvage it than you would get out of it. In other words, there is no salvage value to these buildings. Now, if they do not lend themselves to any other use, I have suffered a complete loss of my depreciated cost.

The Court: I can not see why you would insure something that is absolutely valueless. You would not insure a pile of dirt in the back yard or anything that did not have some value?

Mr. Hyman: The best answer that I can give your Honor is this: the contents of my office my fixtures and everything

—are insured. I dare say they are insured at a very good value, but so far as accounting practice is concerned, they have been written off until they are worth nothing, on the accountant's theory that capital value has all been returned. Now, that does not keep me from insuring my desk. If I insure it, and I receive as insurance the value [fol. 231] of that asset, when a fire takes place, the Government receives a tax on 100 per cent. of my recovery, because you must have in this income tax business a system of accounting, a system of procedure, so that they say to you, "We will allow you to shrink it so much per year—the value of your assets—but anything over and above what is left, you must report back as income without diminution", because that is the only method by which they can arrive at a sane way of accounting. That is why I say that here we have a system which accountancy requires should be upon a normal basis. Actually all the things that are reflected in an income tax return do not happen in that period of years.

The Court: All right. I will consider it. It may be entirely irrelevant.

Mr. Hyman: I think, as a practical man, your Honor will see that there is nothing consistent in that, if you will sit down and analyze your own situation, putting yourself in precisely this same situation. I think you would be a mighty poor business man if, because on your books an asset had been depreciated out, you nevertheless carried no insurance upon it.

The Court: I do not know how I could hope to recover from an insurance company if I had taken a policy on something knowing that it had no value.

Mr. Hyman: The two things are totally distinct, anyway, because here we are confronted with the necessity of ab- [fol. 232] sorbing what we will call an accelerated depreciation. That is our problem here. We are trying to absorb it. The point is, what is the residual value?

The Court: You come here and claim that the absorption is complete; that there is actually no value at the end of this period?

Mr. Hyman: I do, yes.

The Court: And yet you go ahead with thousands of dollars of insurance on something that is of no value?

Mr. Hyman: But why do I claim that it is of no value? I have given you concrete evidence of why it has no value, but that has nothing to do with whether I insure it or not. These men who have testified that these buildings have no salvage value are either telling the truth or they are not.

The Court: No salvage value, but they have a usable value.

Mr. Hyman: I have admitted that. If you will not give me the full allowance based on the theory that I have nothing left, because under the system of accounting I must, in the years in which my misfortune occurs, absorb all of the slack, I say to you if you think it is not proper, then you would take my buildings and say, "Well, I must attribute some value to them because these people are using them". I say theoretically that that is not sound, that the other method is the sound method, adopted by all accountants, but I give the alternative method, because I can see that you might conclude that is proper.

[fol. 233] The Court: Under the alternative method there would be no inconsistency with the existence of insurance. But in the first case, however, I think there would.

Mr. Hyman: I think that the other method is the sound one.

The Court: I will consider it. Go ahead with your testimony.

By Mr. Hyman:

Q. Mr. Loewer has just asked me to show you this ground floor here—the main floor. You recognize those dots which show steel and iron uprights (indicating)?

A. Yes.

Q. You would not attempt to use them in that state as a garage, would you?

A. It is not a question of attempting to do it——

Q. Please. That is a simple question. You could not use it, could you?

A. You could. yes.

Q. How are you going to yet your cars in and out with those posts?

The Court: Mr. Hyman, for the purpose of shortening this examination, I will intimate something to you now—and this is off the record.

(Informal discussion, off the record.)

Mr. Hyman: Then I have no further questions of this witness.

Mr. Feldman: That is all.

(Witness excused.)

Mr. Feldman: I would like to have stipulated in the record the assessed value of these properties, of the buildings themselves.

[fol. 234] Mr. Hyman: I would not stipulate that, just standing alone.

Mr. Feldman: Will you take the stand, Mr. O'Keefe?

John P. O'Keefe, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Court: Do you know the assessed value, Mr. Hyman?

Mr. Hyman: No, sir, I do not.

(Informal discussion, off the record.)

Direct examination.

By Mr. Feldman:

Q. Mr. O'Keefe, did you, at my request, investigate records to find what the assessed value of the property of the V. Loewer's Gambrinus Brewing Company is?

A. I examined the assessment rolls for the years 1913 and 1918, and 1919, and 1928 for the Borough of Manhattan, for the buildings on 40th Street—that is, taking that main building, the brewery building—41st Street, I mean, instead of 40th Street—that is, taking the main building (175 feet front, and the buildings on the opposite side, which include——

The Court: What use is this? It is stipulated that a schedule may be prepared showing the assessed valuation of the various buildings, and the defendant offers it in evidence, and the plaintiff objects on the ground that it

is irrelevant, incompetent and immaterial, and I will reserve [fol. 235] decision upon that, and will now note an exception to either party ultimately ruled against. Meanwhile, you will get the schedule. You do not need to put in all this testimony.

Mr. Feldman: All right.

Q. Will you do that, Mr. O'Keefe?

A. Yes.

Mr. Hyman: If your Honor should, by any chance, admit it, you will allow me to meet it?

The Court: There is an exception noted now in favor of the party ultimately ruled against.

Mr. Hyman: Suppose I wanted to present some facts to you to indicate that it had not any value at all?

The Court: This is just a question of what is shown by the public records.

Mr. Hyman: That is why I say that it has no probative value.

The Court: Perhaps not, but why re-open the case?

Mr. Hyman: But I might want to show you something about the valuations put on those books, and the disregard of relationships between land and buildings, and things of that sort—irregularities all through.

The Court: I do not think that is necessary. However I will see.

Mr. Hyman: It seems to me as proper as this evidence. That is all.

Mr. Feldman: That is all.

(Witness excused.)

[fol. 236] Colloquy Between Court and Counsel

Mr. Feldman: I should like to have in the testimony a statement by the accountant for Mr. Loewer, that the buildings are insured up to 80 per cent. of their assessed value. That is one of the reasons that I wanted the assessed value in.

The Court: Is that accurate?

A Voice: No, I don't think so.

Mr. Loewer: Not the assessed value.

Mr. Feldman: May I request the attorney for the plaintiff to produce those policies, in order that I may have them marked in evidence, subject to objection and exception?

The Court: Instead of marking them in evidence, counsel can agree on a statement as to their contents.

Mr. Feldman: Because I believe that those policies usually have an application or something of the sort that shows that there is a valuation placed upon the building by the insured.

The Court: I do not want the policies in my possession. They may have use for them. What I would prefer in that regard is that you look over the policies, and have copies made of such parts as you think ought to be put in, and offer that in evidence; and that is objected to by the defendant. I will allow that in evidence, with an exception to the defendant,—giving it, however, such consideration as I think it is entitled to. I think it is admissible in evidence.

Mr. Hyman: I can conceive that under certain circumstances, but I would say that such an informal offer, with-
[fol. 237] out having any opportunity to look at the policies myself or to rebut it, would leave me in a rather unfortunate position.

The Court: In this statement as to what the policies and applications contain, either of you can put whatever you want. I had rather not have the physical policies, but pick out just the parts that you think are significant.

Mr. Feldman: We can probably make extracts from them.

The Court: Yes, certainly.

Mr. Hyman: For example, I have the same question that arose inconnection with the other offer——

The Court: If there is something else that you want to put in——

Mr. Hyman: If you will give me the opportunity.

The Court: Yes, certainly. Is there anything else?

Mr. Feldman: No, that is all.

The Court: You can exchange memoranda whenever you want, and after you have exchanged memoranda, then reply, and after you have exchanged your replies, then submit it. It does not matter to me how long it is, as long as you give me the minutes—whether it is tomorrow or ten months hence. Just suit your own convenience.

[fol. 238] Order Settling Bill of Exceptions

Upon the annexed consent and on motion of Charles H. Tuttle, United States Attorney, for the Southern District of New York, I have signed, settled, and allowed the foregoing together with the exhibits offered in evidence and plaintiffs and defendant's findings of fact and conclusions of law with all exceptions taken and filed as defendant's bill of exceptions.

Frank J. Coleman, U. S. D. J.

Consented to. Paskus, Gordon & Hyman, Attorneys for Plaintiff.

Filed May 29, 1929.

[fol. 239] Plaintiff's Exhibit 1

In the District Court of the United States for the Southern District of New York

V. Loewers *Ambrinus* Brewery Company

vs.

Charles W. Anderson

Agreed Statement of Facts

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys of record, that the following facts are true and that this stipulation may be introduced in evidence in whole or in part by either party and the parties shall thereby be relieved of further proof regarding any of the facts stated in the part so introduced, subject, however, to the right of either party to introduce additional evidence on any facts relevant and material to the case.

1. That the plaintiff, on March 15, 1919, filed its tentative income and profits tax return for the calendar year 1918 and on June 5, 1919, within the extension of time allowed, filed its final income and profits tax return for the calendar year 1918, said final return showing an amount of tax due for the said year in the sum of $1,339.13; and that said

amount was paid to the defendant on the dates and in the amounts as follows:

March 24, 1919	$234.06
June 19, 1919	1,105.07
Total	$1,339.13

[fol. 240] 2. That during the year 1924 an additional assessment in the amount of $6,847.43 was levied against the plaintiff on account of income and profits taxes for the calendar year 1918; that said amount was paid by the plaintiff, first by crediting thereto certain certificates of overassessment for other years as follows:

For the year 1913	$60.00
For the year 1914	60.00
For the year 1915	60.00
For the year 1916	120.00
For the year 1917	1,055.16
For the year 1920	1,365.42
Total	$2,720.58

3. That said amount of $2,720.58 represented overpayments made by plaintiff on account of income and/or profits taxes for other years as indicated in the foregoing table; that the credit of said sums was duly authorized by the Commissioner of Internal Revenue and that after crediting said sum of $2,720.58 against said additional assessment, there remained an amount unpaid on said additional assessment of $4,126.85; that said amount of $4,126.85 was paid by plaintiff on June 13, 1924.

4. That the total income and profits taxes paid by the plaintiff on account of the year 1918 amounted to $8,186.56.

5. That on February 14, 1924, plaintiff filed claim for refund of the amount of $1,340.64 which included the amount of $1,339.13 first paid on account of income and [fol. 241] profits taxes for the calendar year 1918 as shown by plaintiff's return and $1.51 interest; that said claim for refund was filed within less than five years after the return for 1918 was due. That on June 24, 1924, plaintiff filed claim for refund of the amount of $6,847.43 representing the amount of additional assessment of income and profits

taxes for the calendar year 1918 as aforesaid; that said claim for refund was filed within less than two years after payment of said additional assessment of $6,847.43 had been made; that said claim for refund totaled the amount of $8,186.56, being the total amount of income and profits taxes paid by plaintiff for the calendar year 1918.

6. That said claims for refund were based upon a claim of the right to deduct from income additional amounts on account of allowances for obsolescence claimed, in respect of brewery buildings and intangible property; that said claims for refund rejected by the Commissioner of Internal Revenue.

7. That the income and profits taxes for a calendar year 1918 assessed against plaintiff as aforesaid were based upon a net income and invested capital as determined by the Commissioner of Internal Revenue as set forth in Bureau letter of May 6, 1924; that in arriving at the net income there shown of $56,832.02 the Commissioner allowed no deduction whatsoever on account of depreciation, obsolescence, loss of useful value or otherwise in respect of any intangible property; and that in computing said net income of $56,832.02 the only amount allowed by the Com- [fol. 242] missioner of Internal Revenue for exhaustion, wear, tear and/or obsolescence, in respect of the brewery buildings, was $4,710.42.

8. That in its claims for refund for the calendar year 1918 plaintiff claimed as an allowance for depreciation and obsolescence of brewery buildings an amount of $21,482.50 in addition to and over and above the amount of $4,710.42 allowed by the Commissioner of Internal Revenue and also claimed an allowance for obsolescence of intangible property in the amount of $95,472.00, no part of which was allowed by said Commissioner nor has any allowance in lieu thereof or in substitution therefor been made; that if said deductions were allowed as claimed the net income of plaintiff for the calendar year 1918 would be converted into a net loss and no income or profits taxes would have been due for the calendar year 1918.

9. That plaintiff, on March 11, 1920, filed its tentative income and profits tax return for the calendar year 1919, and on June 15, 1920, within the extension of time allowed,

filed its final income and profits tax return for the calendar year 1919, said final return showing an amount of tax due for the said year in the sum of $1,008.42; and that said amount was paid to the defendant on the dates and in the amounts as follows:

March 16, 1920	$252.10
June 29, 1920	756.32
Total	$1,008.42

[fol. 243] 10. That during the year 1924 an additional assessment in the amount of $10,171.41 was levied against the plaintiff on account of income and profits taxes for the calendar year 1919; that said amount was paid by plaintiff to defendant on June 13, 1924.

11. That the total income and profits taxes paid by the plaintiff on account of the year 1919 amounted to $11,179.83.

12. That on June 24, 1924, plaintiff filed claim for refund in the amount of $11,179.83 representing the total income and profits taxes theretofore paid by plaintiff for the calendar year 1919; that said claim for refund was filed within less than five years after the return for the calendar year 1919 was due.

13. That said claim for refund was based upon a claim of the right to deduct from income additional amounts on account of allowances for obsolescence claimed in respect of brewery buildings and intangible property; that said claim for refund was rejected by the Commissioner of Internal Revenue.

14. That the income and profits taxes for the calendar year 1919 assessed against the plaintiff as aforesaid were based upon a net income and invested capital as determined by the Commissioner of Internal Revenue as set forth in Bureau letter of May 6, 1924; that in arriving at the net income there shown of $74,838.77 the Commissioner allowed no deduction whatsoever on account of depreciation, obsolescence, loss of useful value or otherwise in respect of [fol. 244] any intangible property; that in computing the said net income of $74,838.77 the only amount allowed by the Commissioner of Internal Revenue for exhaustion,

wear, tear and/or obsolescence in respect of the brewery buildings was $4,883.99.

15. That in its claim for refund for the calendar year 1919 plaintiff claimed as deductions from income an allowance for depreciation and obsolescence of the brewery buildings in the amount of $23,659.58 in addition to and over and above the amount allowed as a deduction by the Commissioner of Internal Revenue; that plaintiff also claimed as a deduction from income an allowance for obsolescence of intangible property in the amount of $104,040.00, no part of which has been allowed by said Commissioner of Internal Revenue and no allowance in lieu thereof or in substitution therefor has been made; that if said deductions were allowed as claimed the net income for 1919 as computed by the Commissioner would have been converted into a net loss and no income or profits taxes would have been due for the calendar year 1919.

16. That the amounts of $4,710.42 and $4,883.99 allowed by the Commissioner of Internal Revenue as deductions for depreciation of brewery buildings for 1918 and 1919, respectively, were computed at the rate of 2 per cent on the cost of the buildings plus the cost of improvements; that the computation of said amounts was made as shown by the following table:

[fol. 245] Cost of building (exclusive of land) together with improvements at December 31, 1917.	$233,968.89	
Additions during 1918	1,552.03	
Total December 31, 1918	$235,520.92@2%	$4,710.42
Additions during 1919	8,678.36	
Total December 31, 1919	$244,199.28@2%	$4,883.99

17. That said allowances represent a correct deduction from income for wear and tear on said brewery buildings but include no allowance for obsolescence or loss of useful value.

18. That the total depreciation on said brewery buildings from the date of their construction in 1905 to December 31, 1917, at the rate of 2 per cent. per annum, was the sum of $57,196.76; that said sum correctly represents the total accrued depreciation on said brewery buildings at December 31, 1917; that the costs as set forth in the foregoing table,

used by the Commissioner in computing the depreciation allowances as aforesaid, correctly represented the true cost of said brewery buildings and improvements thereof.

Dated this 8th day of February, 1928, at New York.

Arthur B. Hyman, by Karl O. Loos, Attorney for Plaintiff. Charles H. Tuttle, Attorney for Defendant.

[fol. 246] PLAINTIFF'S EXHIBIT 2

(Execute Separate Form for Each Tax Period)

Second Amended Claim for Refund

( ) Abatement of Tax Assessed
( ) Credit Against Outstanding Assessments
(xxx) Refund of Taxes Illegally Collected
( ) Refund of Amounts Paid for Stamps Used in Error or Excess

Treasury Department, Internal Revenue Service. Form 843—Jan., 1922. Comptroller General U. S., January 18, 1922.

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

STATE OF NEW YORK,
County of New York, ss:

Type or Print

(Name of taxpayer or purchaser of stamps:) V. Loewers Gambrinus Brewery Company; ——. (Residence—give street and number as well as city or town and State:) 528

West 42nd Street, New York City, N. Y.; (Business address:) ——.

[fol. 247] Period	Year
From Jan. 1	1918
To Dec. 31	1918

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: Brewing and selling beer, ales and porter.

2. Character of assessment of tax: Income and profits taxes. (State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased: Additional assessment, $6,847.43.

4. Reduction of Tax Liability requested (Income and Profits Tax): $6,847.43.

5. Amount to be abated: $——.

6. Amount to be refunded (or such greater amount as is legally refundable): $6,847.43.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks): June 11th, 1924.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: Third, New York.

[fol. 248] 9. District in which unpaid assessment appears: ——.

10. Amount of overpayment claimed as credit: $——.

11. Unpaid assessment against which credit is asked: Period from —— to ——, $——.

Deponent verily believes that this application should be allowed for the following reasons:

Heretofore the taxpayer filed amended claim for refund in the above sum. Claim for refund has been rejected. Since the rejection, the Supreme Court of the United States has rendered decisions in cases of Bowers v. New York & Albany Lighterage Co., Bowers v. Seaman, Staples v. Fuller. As to the sum of $4,126.85, which was paid under protest on the 11th day of June, 1924, said decisions are applicable, and determine and hold that the collecton was illegal and erroneous.

Wherefore taxpayer asks a reconsideration and granting of the claim to the extent of the sum of $4,126.85.

(Signed) Jacob Loewer.

Sworn to and subscribed before me this 21st day of March, 1927. Charles F. Rudershauden, Notary Public, Bronx Co., No. 94. Cert. filed in N. Y. Co. No. 98.

[fol. 249] Amended Claim for

( ) Credit Against Outstanding Assessments
( ) Abatement of Tax Assessed
(xxx) Refund of Taxes Illegally Collected
( ) Refund of Amounts Paid for Stamps Used in Error or Excess

Treasury Department, Internal Revenue Service. Form 843—Jan., 1922. Comptroller General U. S., January 18, 1922.

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

State of New York,
County of New York, ss:

Type or Print

(Name of taxpayer or purchaser of stamps:) V. Loewers Gambrinus Brewery Company; (Residence—give street and

number as well as city or town and State:) 528 West 42nd Street, New York City, N. Y.; (Business address:) ——.

[fol. 250] Period — Year

From Jan. 1 1918
To Dec. 31 1918

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: Brewing and selling beer, ales and porter.

2. Character of assessment of tax: Income and profits taxes. (State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased: Additional assessment, $6,847.43.

4. Reduction of Tax Liability requested (Income and Profits Tax): $6,847.43.

5. Amount to be abated: $——.

6. Amount to be refunded (or such greater amount as is legally refundable): $6,847.43.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks): ——.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: New York City.

[fol. 251] 9. District in which unpaid assessment appears: ——.

10. Amount of overpayment claimed as credit: $——.

11. Unpaid assessment against which credit is asked: period from —— to ——, $——.

Deponent verily believes that this application should be allowed for the following reasons:

The net income of the Company for the year 1918 should be revised as follows:

Net income as adjusted by Internal Revenue Bureau letter dated May 6, 1924		$56,832 02
Deduct:		
Reasonable allowance for depreciation and obsolescence of Brewery building (see schedule 46 at p. 13 of Brief, in support of appeal)	$26,192.92	
Less depreciation allowed by Bureau	4,710.42	
Additional deduction which should be allowed	$21,482 50	
Reasonable allowance for obsolescence of good will (see schedule 30 at p. 49 of Brief, in support of appeal)	95,472.00	
Total deductions which should be allowed and which have been denied by Bureau		116,954.50
Net loss for year 1918		$60,122.48

As a corrected revision of the company's income shows a net loss, no income or profits tax was due and the entire amount paid, both that paid in cash and that paid by credit, of amounts found by the Bureau to be due the tax-[fol. 252] payer on account of adjustments on returns for other years, should therefore be refunded. In this claim refund is claimed for the amount of $6,847.43, this being the amount of the additional assessment against the company pursuant to the Bureau's letters of March 3, 1924 and May 6, 1924. The company had previously paid on account of 1918 income tax the sum of $1,339.13 and refund of this amount has heretofore been claimed by claim for refund filed with the Collector at New York City under date of February 15, 1924. This claim is in addition to the claim for refund filed February 15, 1924.

The brief in support of appeal above referred to is by this reference made a part of this claim for refund. Said brief was filed with the Internal Revenue Bureau at Washington on or about April 3, 1923 under Bureau reference marks IT:CA:M-3 ADS-2121-11. The Bureau's letter of March 3, 1924, above referred to, bears reference marks IT:CA:M-3 JJL-2122-3 and the Bureau's letter of May 6, 1924 above referred to, bears reference marks IT:CA: 2118-3.

(Signed) Jacob Loewer, President. (Seal.)

Sworn to and subscribed before me this 20 day of June, 1924. Charles F. Rudershauden, Notary Public, Bronx Co., 68. Cert. filed in N. Y. Co. 278. (Seal.)

[fol. 253] Claim for

( ) Abatement of Tax Assessed
( ) Credit Against Outstanding Assessments
( ) Refund of Taxes Illegally Collected
( ) Refund of Amounts Paid for Stamps Used in Error or Excess

Treasury Department, Internal Revenue Service. Form 843—Jan., 1922. Comptroller General U. S., January 18, 1922.

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

State of New York,
County of New York, ss:

Type or Print

(Name of taxpayer or purchaser of stamps:) V. Loewer's Gambrinus Brewery Company; (Residence—give street and

number as well as city or town and State:) 528 W. 42nd Street, New York City, N. Y.; (Business address:) ——.

[fol. 254] Period Year

From Jan. 1 1918

To Dec. 31. 1918

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: Brewing and selling beer, ales & porter.

2. Character of assessment or tax: Income tax. (State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased: $1,340.64.

4. Reduction of Tax Liability requested (Income and Profits Tax): $1,340.64.

5. Amount to be abated: $——.

6. Amount to be refunded (or such greater amount as is legally refundable): $1,340.64.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks): March 15, 1919, $234.06; June 5, 1919, $1,106.58.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: New York City—Third District.

[fol. 255] 9. District in which unpaid assessment appears: ——.

10. Amount of overpayment claimed as credit: $——.

11. Unpaid assessment against which credit is asked; period from —— to ——, $——.

Deponent verily believes that this application should be allowed for the following reasons:

[fol. 256] The net income of the Company for the year 1918 should be revised as follows:

Taxable net income as reported on return		$13,159.42
Add:		
Expense adjustment see R. A. R. 3-18-22 Schedule 4	$30,000.00	
Depreciation deducted on return	94,916.01	
		124,916.01
		$138,075.43
Deduct:		
In lieu of depreciation deducted on return the following amounts as explained in the Schedules contained in appeal and statement of Feb. 8, 1923 and Supplemental statement of facts of Feb. 27, 1923, both filed with the Bureau of Internal Revenue marks IT:CA M:3 ADS 2121-11:		
Depreciation on Buildings, Sched. 31	1,679.38	
Depreciation Office Buildings, Sched. 32	679.46	
Bottles & cases, Sched. 33	25,412.40	
Bottling Dept. machinery, Sched. 11	1,900.23	
Bottling Dept. office fixtures, Sched. 12	28.85	
Bottling Dept. Autos, Sched. 24	657.40	
Bottling Dept. Wagons, Sched. 14	140.62	
Bottling Dept. Horses, Sched. 15	190.81	
Bottling Dept. Harness, Sched. 16	11.90	
Cooperage, Sched. 35	8,222.15	
Storage vats, Sched. 36	8,970.79	
Brewing Machinery, Sched. 38	30,653.19	
Automobiles (brewery), Sched. 41	11,253.96	
Wagons and Trucks, Sched. 42	1,211.15	
Harness, Sched. 7	158.13	
Brewery office fixtures, Sched. 8	42.85	
Obsolescence on brewery bldg., Sched. 46	21,513.54	
Obsolescence of goodwill, Sched. 30	95,472.00	
Total deductions		211,197.81
Net Loss		$76,122.38

[fol. 257] As the revision of the Company's income shows a net loss, no income or profits tax was due and the entire amount paid should therefore be refunded.

The appeal and statement and supplemental statement of facts above referred to are by this reference made a part of this claim for refund. The former was filed on February 10, 1923 and the latter on February 27, 1923. Both were filed with the Bureau of Internal Revenue at Washington, D. C., under reference marks IT:CA-M:3 ADS-2121-11. Both were sworn to and contain full statement of facts in support of the adjustments in income above stated. Schedule numbers 1-30 will be found in the appeal and statement filed on February 10, 1923 and Schedules num-

bered 31 to 46 will be found in the supplemental statement filed February 27, 1923.

(Signed) Jacob Loewer, President of V. Loewer's Gambrinus Brewing Co.

Sworn to and subscribed before me this 13th day of February, 1924. Charles F. Rudershausen, Notary Public, Bronx Co. 68. Cert. filed in N. Y. Co. 254. (Seal.)

[fol. 258] No. 14669. New York, March 15, 1919. $234.06.

V. Loewers Gambrinus Brewery Co.

Pay to the Order of Collector of Internal Revenue, 3d Dist., Two Hundred and Thirty-Four & 06 100 Dollars.

Jacob Loewer, President. Henry D. Muller, Treasurer.

To the Bryant Park Bank, 112 West 42nd St., New York.

Back endorsed as follows: Received payment through City Collection Department March 25, 1919. New York Clearing House. Endorsements Guaranteed. Federal Re-[fol. 259] serve Bank. Pay to the Order of Federal Reserve Bank of N. Y. Income and excess profits tax Account. Check is in payment of an obligation to United States and must be paid at par. No Protest. 3. Mar. 24, 1919. N. Y. Mark Eisner, Collector of Internal Revenue, 1150 Broadway, N. Y. City.

No. 14888. New York, June 5, 1919. $1,106 58/100.

V. Loewers Gambrinus Brewery Co.

Pay to the Order of Collector Internal Revenue. Pay $1,106 and 58 Cts. Dollars.

Jacob Loewer, President. Henry D. Muller, Treasurer.

To the Bryant Park Bank, 112 West 42nd, St., New York.

[fol. 260] Back endorsed as follows: Received payment Through the New York Clearing House. Prior endorsements guaranteed. June 21, 1919. Federal Reserve Bank

of N. Y. L. H. Hendricks, Cashier. Pay to the order of Federal Reserve Bank of N. Y. Income and excess profits tax account. Check is in payment of an obligation to United States and must be paid at par. No Protest. 3. Jun. 19, 1919. N. Y. R. J. McElligott Act. Collector of Internal Revenue, 1159 Broadway, N. Y. City.

[fol. 261] (Execute Separate Form for Each Tax Period)

Second Amended Claim for Refund

( ) Abatement of Tax Assessed
( ) Credit Against Outstanding Assessments
(XXX) Refund of Taxes Illegally Collected
( ) Refund of amounts Paid for Stamps
Used in Error or Excess

Treasury Department, Internal Revenue Service. Form 843—Jan., 1922. Comptroller General U. S., January 18, 1922.

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

State of New York,
County of New York, ss:

Type or Print

(Name of taxpayer or purchaser of stamps:) V. Loewers Gambrinus Brewery Company; (Residence—give street and number as well as city or town and State:) 528 West 42nd Street, New York City, N. Y.; (Business address:) — .

[fol. 262] Period — Year

From Jan. 1 1919
To Dec. 31 1919

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: Brewing and selling beer, ales and porter.

2. Character of assessment or tax: Income and profits taxes. (State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased: Additional assessment, $11,179.83.

4. Reduction of Tax Liability requested (Income and Profits Tax): $11,179.83.

5. Amount to be abated: $——.

6. Amount to be refunded (or such greater amount as is legally refundable): $11,179.83.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks): $1,008.42 paid; $10,171.41, June 11 24.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

[fol. 263] 8. District in which return (if any) was filed: Third, New York.

9. District in which unpaid assessment appears: ——.

10. Amount of overpayment claimed as credit: $——.

11. Unpaid assessment against which credit is asked: Period from —— to ——, $——.

Deponent verily believes that this application should be allowed for the following reasons:

Heretofore the taxpayer filed amended claims for refund in the above sum. Claim for refund has been rejected. Since the rejection, the Supreme Court of the United States has rendered decisions in the cases of Bowers v. New York & Albany Lighterage Co., Bowers v. Seaman, Staples v. Fuller. As to the sum of $10,175.45, which was paid under

protest on the 11th day of June, 1924, said decisions are applicable, and determine and hold that the collection was illegal and erroneous.

Wherefore taxpayer asks a reconsideration and granting of the claim to the extent of the sum of $10,175.45.

(Signed) Jacob Loewer.

Sworn to and subscribed before me this 21st day of March, 1927. Charles F. Rudershausen, Notary Public, Bronx Co., No. 94. Cert. filed in N. Y. Co. No. 98. (Seal.)

[fol. 264] Amended Claim for

( ) Abatement of Tax Assessed
( ) Credit Against Outstanding Assessments
(XXX) Refund of Taxes Illegally Collected
( ) Refund of Amounts Paid for Stamps Used in Error or Excess

Treasury Department, Internal Revenue Service. Form 843—Jan., 1922. Comptroller General U. S., January 18, 1922.

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

State of New York
County of New York, ss:

Type or Print

V. (Name of taxpayer or purchaser of stamps.) Loewers Gambrinus Brewery Company, (Residence—give street and number as well as city or town and State): 528 West 42nd Street, New York City, N. Y.; (Business address:) ——.

[fol. 265] Period	Year
From Jan. 1	1919
To Dec. 31	1919

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: Brewing and selling beer, ales and porter.

2. Character of assessment or tax: Income and profits taxes. (State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased: Additional assessment, $11,179.83.

4. Reduction of Tax Liability requested (Income and Profits Tax): $11,179.83.

5. Amount to be abated: $——.

6. Amount to be refunded (or such greater amount as is legally refundable): $11,179.83.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks): $1,008.42, paid ——; $10, 171.41 paid ——.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

[fol. 266] 8. District in which return (if any) was filed: New York City.

9. District in which unpaid assessment appears: ——.

10. Amount of overpayment claimed as credit: $——.

11. Unpaid assessment against which credit is asked: Period from —— to ——, $——.

Deponent verily believes that this application should be allowed for the following reasons:

The net income of the Company for the year 1919 should be revised as follows:

Net income as adjusted by Internal Revenue Bureau letter dated May 6, 1924		$74,838.77
Deduct:		
Reasonable allowance for depreciation and obsolescence on Brewery building (see schedule 46 at p. 13 of Brief in support of appeal)	$28,543.57	
Less depreciation allowed by Bureau	4,883.99	
Additional deduction which should be allowed	$23,659.58	
Reasonable allowance for obsolescense of good-will (see schedule 30 at p. 19 of Brief in support of appeal)	$104,040.00	
Total deductions which should be allowed and which have been denied by the Bureau		127,699.58
Net loss for year 1919		$52,860.81

[fol. 267] As the corrected revision of the company's income shows a net loss, no income or profits tax was due, and the entire amount paid should therefore be refunded. Of the amount claimed as refund $1,008.42 was assessed and paid upon the filing of the original return, the dates of payment of that amount being as shown above. An additional assessment of $10,171.41 was made as a result of the Bureau's letters of March 3, 1924 and May 6, 1924. Refund is claimed of the entire amount of this additional assessment whether paid in cash or by credit of amounts found by the Bureau to be due the taxpayer on account of the adjustments of taxes for other years.

The brief in support of appeal above referred to is by this reference made a part of this claim for refund. Said brief was filed with the Internal Revenue Bureau at Washington on or about April 3, 1923 under Bureau reference marks IT:CA:M-s ADS-2121-11. The Bureau's letter of March 3, 1924, above referred to, bears reference marks IT:CA:M-3 JJL-2122-3 and the Bureau's letter of May 6, 1924 above referred to, bears reference marks IT:CA:-2118-3.

(Signed) Jacob Loewer, President.

Sworn to and subscribed before me this 20 day of June, 1924. Charles F. Rudershausen, Notary Public, Bronx Co., 68. Cert. filed in N. Y. Co. 278. (Seal.)

[fol. 268] Claim for

( ) Abatement of Tax Assessed
( ) Credit Against Outstanding Assessment
( ) Refund of Taxes Illegally Collected

( ) Refund of Amounts Paid for Stamps Used in Error or Excess

Treasury Department, Internal Revenue Service. Form 843 Jan., 1922. Comptroller General U. S., January 18, 1922.

Important

File with Collector of Internal Revenue where assessment was made Not acceptable unless completely filled in.

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

STATE OF NEW YORK,
County of New York, ss:

Type or Print

(Name of taxpayer or purchaser of stamps:) V. Loewer's Gambrinus Brewery Company, (Residence—give street and number as well as city or town and State): 528 W. 42nd Street, New York City, N. Y.; (Business address:) ——

[fol. 239] Period — Year

From Jan. 1 1918
To Dec. 31 1918

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: Brewing and selling beer, ales & porter.

2. Character of assessment or tax: Income tax. (State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased: $1,340.64.

4. Reduction of Tax Liability requested (Income and Profits Tax): $1,340.64.

5. Amount to be abated: $——.

6. Amount to be refunded (or such greater amount as is legally refundable): $1,340.64.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks: March 15, 1919, $234.06; June 5, 1919, $1,106.58.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

[fol. 270] 8. District in which return (if any) was filed: New York City—Third District.

9. District in which unpaid assessment appears: ——.

10. Amount of overpayment claimed as credit: $——.

11. Unpaid assessment against which credit is asked: Period from —— to ——, $——.

Deponent verily believes that this application should be allowed for the following reasons:

[fol. 271] The net income of the Company for the year 1918 should be revised as follows:

Taxable net income as reported on return		$13,159.42
Add:		
Expense adjustment see R. A. R. 3-18-22 Schedule 4	$30,000.00	
Depreciation deducted on return	94,916.01	
		124,916.01
		$138,075.43
Deduct:		
In lieu of depreciation deducted on return the following amounts as explained in the Schedules contained in appeal and statement of Feb. 8, 1923 and Supplemental statement of facts of Feb. 27, 1923, both filed with the Bureau of Internal Revenue marks IT:CA-M:3 ADS 2121-11:		
Depreciation on Buildings, Sched. 31	4,679.38	
Depreciation Office Buildings, Sched. 32	679.46	
Bottles & cases, Sched. 33	25,412.40	
Bottling Dept. machinery, Sched. 11	4,900.23	
Bottling Dept. office fixtures, Sched. 12	28.85	
Bottling Dept. Autos, Sched. 34	657.40	
Bottling Dept. Wagons, Sched. 14	140.62	
Bottling Dept. Horses, Sched. 15	190.81	
Bottling Dept. Harness, Sched. 16	11.90	
Cooperage, Sched. 35	8,222.15	
Storage vats, Sched. 36	8,970.79	
Brewing Machinery, Sched. 38	30,653.19	
Automobiles (brewery), Sched. 41	11,253.06	
Wagons and Trucks, Sched. 42	1,211.15	
Harness, Sched. 7	158.13	
Brewery office fixtures, Sched. 8	42.85	
Obsolescence on brewery bldg., Sched. 46	21,513.54	
Obsolescence of goodwill, Sched. 30	95,472.00	
Total deductions		214,197.61
Net Loss		$76,122.18

[fol. 272] As the revision of the Company's income shows a net loss, no income or profits tax was due and the entire amount paid should therefore be refunded.

The appeal and statement and supplemental statement of facts above referred to are by this reference made a part of this claim for refund. The former was filed on February 10, 1923 and the latter on February 27, 1923. Both were filed with the Bureau of Internal Revenue at Washington, D. C., under reference marks—IT:CA-M-3 ADS-2121-11. Both were sworn to and contain full statement of facts in support of the adjustments in income above stated. Schedule numbers 1-30 will be found in the appeal and statement filed on February 10, 1923 and Schedules numbered 31 to 46 will be found in the supplemental statement filed February 27, 1923.

(Signed) Jacob Loewer, President of V. Loewer's Gambrinus Brewing Co.

Sworn to and subscribed before me this 13th day of February, 1924. Charles F. Rudershausen, Notary Public, Bronx Co. 68. Cert. filed in N. Y. Co. 254. (Seal.)

[fol. 273] No. 14669.

V. Loewers Gambrinus Brewery Co.

New York, March 15, 1919. $234. 06/xx.

Pay to the Order of Collector of Internal Revenue, 3d Dist., Two Hundred and Thirty-Four & 06/100 Dollars.

Jacob Loewer, President. Henry D. Muller, Treasurer.

To the Bryant Park Bank, 112 West 42nd St., New York.

Back endorsed as follows: Received payment Through City Collection Department March 25, 1919. New York Clearing House. Endorsements Guaranteed. Federal Re-[fol. 274] serve Bank. Pay to the Order of Federal Reserve Bank of N. Y. Income and excess profits tax Account. Check is in payment of an obligation to United States and must be paid at par. No Protest. 3 Mar. 24,

1919, N. Y. Mark Eisner, Collector of Internal Revenue, 1150 Broadway, N. Y. City.

No. 14888.

V. Loewers Gambrinus Brewery Co.

New York, June 5, 1919. $1106.58 100.

Pay to the Order of Collector of Internal Revenue Pay $1,106 and 58 Cts. Dollars.

Jacob Loewer, President. Henry D. Muller, Treasurer.

To the Bryant Park Bank, 112 West 42nd St., New York.

[fol. 275] Back endorsed as follows: Received payment Through the New York Clearing House. Prior endorsements guarante-d. June 21, 1919. Federal Reserve Bank of N. Y. L. H. Hendricks, Cashier. Pay to the order of Federal Reserve Bank of N. Y. Income and excess profits tax account. Check is in payment of an obligation to United States and must be paid at par. No Protest. 3 Jun. 19, 1919, N. Y. R. J. McElligott Act. Collector of Internal Revenue, 1150 Broadway, N. Y. City.

[fol. 276] PLAINTIFF'S EXHIBIT 3

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and Refer to IT:CA:M-2. CJ-2110-2.

Jan. 11, 1923.

V. Loewers Gambrinus Brewery Co., 528-532 West 42nd St., New York, N. Y.

SIRS: An examination of your income tax returns and of your books of account and records for the years 1909 to 1920 discloses an additional tax liability for the years 1918 and 1919 aggregating $59,884.47 and overassesments for

the years 1909 to 1920 amounting to $3,473.93 as shown in detail in the attached statement.

In accordance with the provisions of Section 250(d) of the Revenue Act of 1921, you are granted thirty days within which to file an appeal and show cause or reason why this tax or deficiency should not be paid. No particular form of appeal is required, but if filed it must set forth specifically the exceptions upon which it is taken, shall be under oath, contain a statement that it is not for the purpose of delay, and the facts and evidence upon which you rely must be fully [fol. 277] stated. The appeal, if filed, must be addressed to the Commissioner of Internal Revenue, Washington, D. C., for the specific attention of IT:CA:M-2, PC 2110-2 and will be referred to the Income Tax Unit before transmittal to the agency designated for the hearing of such appeals.

You may, if you desire, request a conference before the Income Tax Unit in connection with the appeal, to be held within the period prior to the expiration of five days after the time prescribed for the filing of the appeal. If the Income Tax Unit is unable to concede the points raised in your appeal, it will be transmitted together with the recommendation of the Income Tax Unit, to such agency as the Commissioner may designate for final consideration.

In view of the limitation of time for making additional assessments as provided in the Revenue Act of 1921, together with the desire of the Income Tax Unit to make additional assessments only after careful consideration of all the facts in the case, it will be necessary, if an appeal is filed as outlined above, to execute and return the enclosed form of waiver with such appeal.

Where a taxpayer has been given an opportunity to appeal and has not done so, as set forth above, and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement of the assessment will be entertained.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and [fol. 278] remittance should then be made to him.

Respectfully, E. H. Balson, Deputy Commissioner.

Statement

IT:CA:M-2 CJ-2110-2

Jan. 11, 1923.

In re V. Loewers Gambrinus Brewery Co., 528-532 West 42nd St., New York, N. Y.

	Additional tax	Overassessment
1909		$89 65
1910		89 65
1911		89 92
1912		33 12
1913		152 65
1914		141 84
1915		151 23
1916		305 29
1917		1,055 16
1918	$34,352 18	
1919	25,532 29	
1920		1,365 42
Totals	$59,884 47	$3,473 93

Net Additional Tax, $56,410.54.

[fol. 279] The Revenue Agent's report dated February 18, 1922, indicates that you have been advised of the corrections made in your returns and his report has been accepted by this office as submitted, except as follows:

For 1918 the additional tax has been decreased from $34,426.34 to $34,352.18 due to adjustment to invested capital for the overassessments of income tax for 1913 to 1916 inclusive.

For 1919 taxable interest on United States 4¾% Victory Liberty Loan Notes has been increased from $325.10 as shown in the Revenue Agent's report to $468.48, the correct amount, and invested capital has been adjusted for the overassessments for 1909 to 1917 inclusive, which adjustments decrease the additional tax from $25,588.53 as recommended by the Revenue Agent to $25,532.99.

The overassessments shown herein will be made the subject of Certificates of Overassessment, which will reach

you in due course through the office of the Collector of Internal Revenue for your district, and will be applied by that official in accordance with Section 252 of the Revenue Act of 1921.

[fol. 280] PLAINTIFF'S EXHIBIT 4

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and Refer to IT:CA:M-3 JJL-2122-3.

Mar. 3, 1924.

V. Loewers Gambrinus Brewery Company, 528-532 West 42nd Street, New York, N. Y.

SIRS: A re-examination of your income and profits tax returns for the years 1909 to 1920, inclusive, has been made in connection with the additional information submitted in your briefs dated February 10, 1923, and February 24, 1923, and in accordance with the recommendation dated January 4, 1924, of the Solicitor, disclosing a net additional tax of $17,816.65.

[fol. 281] Office letter to you dated January 11, 1923, has, therefore, been withdrawn and the revised computations are shown as follows:

Year	Additional tax	Over-assessment
1909		
1910		
1911		
1912		
1913		
1914		$60.00
1915		60.00
1916		60.00
1917		120.00
1918		1,055.16
1919	$8,948.21	
1920	11,589.02	
		1,365.42
Totals	$20,537.23	$2,720.58

Net additional tax $17,816.65.

1909	
Net income as reported	$31,375.50
Less exemption	5,000.00
Amount taxable at 1%	$26,375.50
Tax assessable at 1%	$262.76
Tax previously assessed	263.76
Overassessment	None

[fol. 282]

1910	
Net income as reported	$25,419.55
Less exemption	5,000.00
Amount taxable at 1%	$20,419.55
Tax assessable at 1%	$204.20
Tax originally assessed	204.20
Overassessment	None
1911	
Net income	$21,402.23
Less exemption	5,000.00
Amount taxable at 1%	$16,402.23
Tax at 1%	$164.02
Tax originally assessed	164.02
Overassessment	None
1912	
Net income	$8,311.88
Exemption	5,000.00
Amount taxable at 1%	$3,311.88
Tax at 1%	$33.12
Tax originally assessed	33.12
Overassessment	None

[fol. 283]

1913

Net income as reported	$32,368.68
Less accrued expense (Section 252)	6,000.00
Net income as adjusted	$26,368.68
Tax assessable at 1%	$263.69
Tax previously assessed	323.69
Overassessment	$60.00

1914

Net income as reported	$14,184.00
Less accrued expense (Section 252)	6,000.00
Net income as adjusted	$8,184.00
Tax assessable at 1%	$81.84
Tax previously assessed	141.84
Overassessment	$60.00

1915

Net income as reported	$17,263.18
Less accrued expense (Section 252)	6,000.00
Net income as adjusted	$11,263.18
Tax assessable at 1%	$112.63
Tax previously assessed	172.63
Overassessment	$60.00

[fol. 284]

1916

Net income as reported	$38,951.63
Less accrued expense (Section 252)	6,000.00
Net income as adjusted	$32,951.63
Tax assessable at 2%	$659.03
Tax previously assessed	779.03
Overassessment	$120.00

1917

Net loss as reported by revenue agent	$22,527.14
(Amount brought forward)	$22,527.14
Excessive depreciation	17,964.88
Net loss as adjusted	$4,562.26
Tax assessable	
Tax previously assessed	$1,055.16
Overassessment	$1,055.16

1918

Net income as reported by revenue agent		$85,436.55
Less:		
Depreciation and losses claimed in brief	$75,770.32	
Depreciation allowed by revenue agent	52,638.88	
		23,131.44
Net income as adjusted		$62,305.11

[fol. 285] Invested Capital

Capital stock	$100,000.00
Surplus as corrected	504,336.34
Overpayment of taxes, 1913 to 1916, inclusive	300.00
Total	$604,636.34
Less deduction on account of inadmissibles .01285	7,769.58
Invested capital adjusted	$596,866.76
Excess profits credit	50,749.34
War profits credit	62,686.68

Computation of Tax

Profits tax		$3,466.73
Tax assessable at 12%		6,820.61
Total tax assessable		$10,287.34
Tax previously assessed		1,339.13
Additional tax		$8,948.21

1919

Net income as reported by revenue agent		$114,900.14
Add accrued interest on 4¾% Victory notes not reported		143.38
Total		$115,043.52
[fol. 286] Less:		
Depreciation and losses claimed in brief	$88,896.74	
Allowed by the revenue agent	54,160.00	
		34,736.74
Net income as adjusted		$80,306.78

Invested Capital

Capital stock		$100,000.00
Surplus as corrected		561,284.12
Overpayment of taxes, 1913 to 1917, inclusive		1,319.18
Total		$662,603.30
Less:		
Preceding years' tax of $10,287.34 prorated	$4,347.45	
Dividend paid January 2, $908,000.00 prorated	7,978.08	
Dividend paid January 29, 1919, of $4,000.00 prorated	3,693.15	
		16,018.68
Balance		$646,584.62
Less deduction for inadmissibles, .02247		14.528.76
Invested capital adjusted		$632,055.86
Excess profits credit		53,564.47

[fol. 287] Computation of Tax

Profits tax		$5,348.46
Tax assessable at 10%		7,248.98
Total tax assessable		$12,597.44
Tax previously assessed		1,008.42
Additional tax		$11,589.02

1920

Net income as reported by revenue agent		$45,109.08
Depreciation and losses claimed in brief	$28,846.15	
Allowed by agent	54,446.73	
		25,600.58
Net loss as adjusted		$19,508.50
Tax assessable		
Tax previously assessed		$1,365.42
Overassessment		$1,365.42

Your claim for refund of $1,055.16, corporation income and profits taxes for the year 1917 will be allowed in full.

The overassessments shown herein will be made the subject of certificates of overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 252 of the Revenue Act of 1921.

This tax liability for the years 1913 to 1916, inclusive, has been adjusted under that part of Section 252 of the [fol. 288] Revenue Act of 1921 as amended, relating to reductions of invested capital due to the failure to take adequate deductions in previous years which has resulted in the payment of excessive income tax in those years.

Inasmuch as your contentions have been allowed in full with the exception of the deduction for obsolescence, the adjustment of which is governed by the Solicitor's recommendation, your case will be forwarded for listing immediately.

A copy of this letter is being forwarded to your representative, Carl D. Loos, Washington, D. C.

Respectfully, J. G. Bright, Deputy Commissioner, by W. R. Clute, Head of Division.

[fol. 289] PLAINTIFF'S EXHIBIT 5

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and Refer to IT:CA:2118-3.

May 6, 1924.

V. Loewer's Gambrinus Brewery Co., 528 West 42nd Street, New York, N. Y.

SIRS: A re-examination of your income and profits tax returns for the years 1918 and 1919 in connection with the additional information submitted April 5, 1924, has been made and indicates overassessments as follows:

	Overassessments
1918	
1919	$2,100.78
	1,417.61
Total	$3,518.39

The detailed computations are as follows:

[fol. 290] 1918

Net Income

Net income as adjusted in office letter dated March 3, 1924	$62,305.11
Adjustment to depreciation as claimed	5,473.09
Net income as adjusted	$56,832.02

Invested Capital

Capital stock	$100,000.00
Surplus	504,336.34
Total	$604,336.34
Amount brought forward	$604,336.34
Overpayment of tax in prior years (1913-1916)	300.00
Total additions	$604,636.34
Inadmissibles .01292	7,811.90
Invested capital	$596,824.44

The adjustment for inadmissibles is explained in the following computation:

	Inadmissibles	Admissibles
Opening balance sheet	$8,934.26	$917,156.70
Closing balance sheet	13,434.26	813,023.35
Total	$22,368.52	$1,730,180.05
Average	11,184.26	865,090.03

[fol. 291]

Tax Computation

Net income		$56,832.02	
Less:			
Profits tax	$1,825.82		
Exemption	2,000.00		
		3,825.82	
Balance subject to tax at 12%		$53,006.20	
Total profits tax			$1,825.82
Amount of tax at 12%			6,360.74
Total tax assessable			$8,186.56
Tax			10,287.34
Overassessed			$2,100.78

1919

Net Income

Net income as adjusted per office letter dated March 3, 1924	$80,306.78
Adjustment to depreciation as claimed	5,468.01
Net income as adjusted	$74,838.77

Invested Capital

Capital stock	$100,000.00
Surplus	555,811.03
Total	$655,811.03
Overpayment of tax in prior years (1913-1917)	1,319.18
Total additions	$657,130.21

[fol. 292] Deductions:

Preceding year's tax $8,186.56 prorated x .422602	$3,459.66	
Dividends ½	7,978.08	
1 29	3,693.15	
		15,130.89
Balance		$641,999.32
Inadmissibles .02269		14,566.96
Invested capital		$627,432.36

Deductions of Inadmissibles

	Inadmissibles	Total
Opening balance sheet	$13,434.26	$813,023.35
Closing balance sheet	23,792.26	827,098.97
Total	$37,226.52	$1,640,122.32
Average	18,613.26	820,061.16

Tax Computation

Net income		$74,838.77	
Less:			
Profits tax	$4,328.84		
Exemption	2,000.00		
		6,328.84	
Balance subject to tax at 10%		$68,509.93	
Total profits tax			$4,328.84
Amount of tax at 10%			6,850.99
Total tax assessable			$11,179.83
Original tax			12,597.44
Overassessment			$1,417.61

[fol. 293] The surplus account as at January 1, 1919 has been adjusted to reflect the additional depreciation allowed for 1918.

In connection with this audit consideration has been given your claim for the refund of 1918 income and profits taxes in the amount of $1,340.64.

The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 252 of the Revenue Act of 1921.

Inasmuch as your contentions have been allowed in full the case will be forwarded for immediate closing on the basis outlined herein.

Respectfully, J. G. Bright, Deputy Commissioner, by W. R. Clute, Head of Division.

[fol. 294] PLAINTIFF'S EXHIBIT 6.

Receipt for Payment of Taxes

Duplicate

Form 1—Revised March, 1923. Treasury Department, Internal Revenue Service.

Collector's Office, 3rd District of New York at N. Y.

Date: June 11th, 1924.

(Name and Address of Taxpayer:) Loewers Gambrinus Brewery Co., 520 West 42nd St., New York, N. Y.
Amount: $4,126.85.
Received payment.
1918—402871.
O L 3/3/24.
Mar. 08 SPL 10.

Stamp: Office of the Collector of Internal Revenue. Received with remittance 2 Jun. 11, 1924. 2 Third District, New York.

[fol. 295] June 11th, 1924.

V. Loewers Gambrinus Brewery Co.—Income-tax Additional Assessment, 1918

Collector of Internal Revenue, Third District, Broadway & 57th St., New York City.

Dear Sir: We enclose check for $4,126.85, in payment of your notice and demand thereto attached, representing assessment of additional taxes for the year 1918.

The payment represented by this check is made under protest. Payment is made to avoid distraint and other penalties which would follow non-payment, but the assessment so being paid is erroneous and illegal in that it disregards the claims of the taxpayer to various allowances for depreciation and obsolescence made to the Commissioner of Internal Revenue and disallowed by him, as well as other claims set up in the statement and briefs on appeal filed in his office.

Notice is hereby given that a refund of the amount so paid will be demanded and upon its denial, action will be brought against you for the recovery of the same.

Very truly yours, Paskus, Gordon & Hyman, Arthur B. Hyman, Atty-. for Taxpayer.

ABH:C.

[fol. 296] PLAINTIFF'S EXHIBIT 7

Receipt for Payment of Taxes

Original

Form 1—Revised March, 1923. Treasury Department, Internal Revenue Service.

Collector's Office, 3rd District of New York, at N. Y.

Date: June 11th, 1924.

(Name and Address of Taxpayer:) Loewers Gambrinus Brewery Co., 520 West 42nd St., New York, N. Y.

Amount: $10,171.41.

Received payment.

1919—406830.

O L 3/3/24.

Mar. 09 SPL 10.

Stamp: Office of the Collector of Internal Revenue. Received 2 Jun. 11, 1924, 2 With remittance. Third District, New York.

[fol. 297] June 11th, 1924.

V. Loewers Gambrinus Brewery Co.—Income-tax Additional Assessment, 1919

Collector of Internal Revenue, Third District, Broadway & 57th St., New York City.

DEAR SIR: We enclose check for $10,171.41, in payment of your notice and demand thereto attached, representing assessment of additional taxes for the year 1919.

The payment represented by this check is made under protest. Payment is made to avoid distraint and other penalties which would follow non-payment, but the assessment so being paid is erroneous and illegal in that it disregards the claims of the taxpayer to various allowances for depreciation and obsolescence made to the Commissioner of Internal Revenue and disallowed by him, as well as other claims set up in the statement and briefs on appeal filed in his office.

Notice is hereby given that a refund of the amount so paid will be demanded and upon its denial, action will be brought against you for the recovery of the same.

Very truly yours, Arthur B. Hyman, Atty. for Taxpayer.

ABH:C.

[fol. 298] PLAINTIFF'S EXHIBIT 8

March 23rd, 1927.

V. Loewers Gambrinus Brewery Co.

Income Tax, 1918-1919

Collector of Internal Revenue, Third District, Broadway & 57th St., New York City.

DEAR SIR: We enclose herewith the two following second amended claims for refund of V. Loewers Gambrinus Brewery Co.:

Year 1918	$6,847.43
Year 1919	11,179.83

Please forward these claims at once to Washington, as we are having our correspondents take up personally with the Bureau, our desire to have these claims acted upon at once.

Very truly yours, Paskus, Gordon & Hyman.

ABH:C.
encls.

[fol. 299] PLAINTIFF'S EXHIBIT 9

Schedule 18

Annual Output, in Barrels

Year	Total output
1905	104,776
1906	119,632
1907	116,384
1908	98,301
1909	97,183
1910	100,849
1911	108,125
1912	103,523
1913	106,229
1914	89,485
1915	91,763
1916	98,567
1917	84,819
1918	77,941
1919 (prior to Oct. 28)	60,682
Total	1,458,259
Average per year	98,332

[fol. 300] PLAINTIFF'S EXHIBIT 11

Obsolescence of Buildings, Based on Salvage Value, January, 1920

Cost of Buildings	$203,968.89
Depreciation to January 31, 1918	50,036.71
Depreciated Cost at January 31, 1918	$153,932.18
Salvage Value	0.00
(Obsolescence 1-31-18 to 1-16-20	$153,932.18

Spread of Obsolescence, Based on Salvage Value, January, 1920

	1918	1919	1920
Obsolescence of buildings	$72,053.36	$78,603.67	$3,275.15

[fol. 301] DEFENDANT'S EXHIBIT A

IT:CA:M-3 JJL-2122-3

V. Loewers Gambrinus Brewery Co.

Deductions Allowed for Depreciation and Loss in Useful Value

Assets	1918	1919	1920
Building	$4,710.42	$4,883.99	$4,883.99
Office Building	679.46	679.46	679.46
Bottles and Cases	25,412.40	15,247.45	15,247.45
Bottling Dept.—Autos	657.40	657.40	1,014.64
Cooperage	8,222.15	7,004.58	916.72
Storage Vats	8,970.79	7,614.66	833.97
Machinery	11,787.92	45,287.92	5,269.92
Brewery Autos	13,871.43	6,759.18	.....
Wagons and Trucks	1,458.35	762.10	.....
Total	$75,770.32	$88,896.74	$28,846.15

[fol. 302] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

ORDER WAIVING PRINTING OF EXHIBITS

On the annexed consent of the parties hereto, it is

Ordered that plaintiff's Exhibit 10 and defendant's Exhibits B, C and D, and the stipulation of the parties hereto,

approved by the Court admitting certain papers in evidence, including chattel mortgage, a letter from the attorney for the plaintiff, dated February 20, 1929, forms of application for correction of assessment for the years 1918 to 1924 and a form of insurance policy, need not be printed in the record herein, but the same may be referred to at the hearing and shall be deemed as part of the record as if the same shall be printed herein.

Dated New York, November 25, 1929.

Manton, U. S. C. J.

[fol. 303] Entry of the above order is hereby consented to.

Dated New York, November 25, 1929.

Paskus, Gordon & Hyman, Attorney- for Appellee.
Charles H. Tuttle, United States Attorney, Attorney for Appellant.

[fol. 304] In United States District Court

[Title omitted]

Petition for Appeal and Order Allowing Same

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Charles W. Anderson, Collector of Internal Revenue, the above named defendant, feeling himself aggrieved by a judgment made and entered herein on April 10, 1929, in the sum of $22,091.20, together with interest and costs, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors which is filed herewith, and prays for an order allowing him to prosecute said appeal and that a transcript of record, papers and proceedings upon which the said order was made, may be duly authenticated and sent to the Circuit Court of Appeals for the Second Circuit and that a citation be issued, as provided by law.

[fol. 305] Dated New York, June 25th, 1929.

Charles H. Tuttle, United States Attorney, Southern District of New York, Attorney for Defendant.
Office & P. O. address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

It is ordered that the appeal, as above prayed for, be allowed.

Dated New York, June 25th, 1929.

Frank J. Coleman, U. S. D. J.

[fol. 306] In United States District Court

[Title omitted]

Assignment of Errors

The defendant, Charles W. Anderson, Collector of Internal Revenue, for his assignment of errors respectfully alleges that:

1. The Court erred in making its findings of fact numbered 3, 4, 6, 7, 11, 12, 14, both findings numbered 15, findings numbered 16, 17 and 18, in that there was no evidence whatever to support any or all of said findings.

2. The Court erred in refusing to find as facts defendant's proposed findings of fact numbered 1-30 inclusive, and in making findings numbered 21 and 22, proposed by the defendant after the same were amended by the Court without the consent of the defendant.

3. The Court erred in holding as a matter of law that the plaintiff was entitled to an allowance of obsolescence of good will.

[fol. 307] 4. The Court erred in finding as a matter of law that the plaintiff was entitled to obsolescence on buildings.

5. The Court erred in finding as a matter of law that the plaintiff was entitled to obsolescence on buildings in excess of the amount claimed therefor in the claim for refund filed by the defendant and in the stipulation of the parties.

6. The Court erred in finding as a matter of law that the plaintiff was entitled to recover any amount based upon the claim that the taxes or any part of them had been collected after the statute of limitations had expired in that none of the claims for refund filed with the Commissioner of Internal Revenue made any claim on said ground, excepting

only such claims for refund which were filed after this action was commenced, and the Court erred in admitting such latter claims for refund in evidence over the objection and exception of the defendant.

7. The Court erred in directing judgment for the plaintiff and in failing to direct judgment for the defendant.

Dated June 25th, 1929.

Charles H. Tuttle, United States Attorney, Attorney for the Defendant. Office & P. O. address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

[fol. 308] Citation, in usual form, omitted in printing.

[fol. 309] In United States District Court

[Title omitted]

Stipulation on Appeal Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated December 2nd, 1929.

Paskus, Gordon & Hyman, Attorneys for Plaintiff.
Charles H. Tuttle, United States Attorney, Attorney for Defendant.

[fol. 310] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 311] In United States Circuit Court of Appeals for the Second Circuit

V. Loewers Gambrinus Brewery Co., Appellee,

against

Charles W. Anderson, Individually and as Collector of Internal Revenue of the United States of America, Appellant

Before Manton, Swan, and A. N. Hand, Circuit Judges

Appeal from the District Court for the Southern District of New York. Suit by V. Loewers Gambrinus Brew-

ery Co., plaintiff, against Charles W. Anderson, etc., defendant to recover income and profits tax paid under duress for the years 1918 and 1919. Judgment for plaintiff; defendant appeals. Reversed.

Paskus, Gordon & Hyman, Esqs., Attorneys for Plaintiff; Arthur B. Hyman, Esq., of Counsel.

Charles H. Tuttle, Esq., United States Attorney; Leon E. Spencer, Esq., of Counsel.

OPINION

Per CURIAM:

This action was brought to recover income and profits taxes alleged to have been erroneously collected for the calendar years 1918 and 1919. The basis of the action was the failure of the appellant to allow as deductions from [fols. 312 & 313] gross income, a reasonable allowance for obsolescence of tangible as well as intangible assets. The appellee is a brewing company and sought to deduct for obsolescence the valuation of its building, formerly used in its brewing business, found by the court below to be of the value of $159,932.18. There is also a finding of loss of an intangible—the good will of the appellee's business. It is unnecessary to consider the latter, for the obsolescence of the tangible property—the building—if allowed, is sufficient to sustain the deduction.

In view of the decision of the Supreme Court in Clarke vs. Haberle Crystal Springs Brewing Co. ([1929] 280 U. S. 384; 74 L. Ed. 227) a deduction in the value of the building for obsolescence may not be made. We can see no difference between tangible and intangible property within the principle of that case. It seemed plain to the Supreme Court that "when a business is extinguished as noxious under the Constitution the owners cannot demand compensation from the government, or a partial compensation in the form of an abatement of taxes otherwise due," and it also seemed "no less plain that Congress cannot be taken to have intended such a partial compensation to be provided for by the words 'exhaustion or obsolescence.'" (280 U. S. 384, 386; 74 L. Ed., 227, 228.)

In view of that authoritative decision, we must reverse the decree below.

Decree reversed.

[fol. 314] In United States Circuit Court of Appeals, Second Circuit

V. Loewers Gambrinus Brewery Co., Plaintiff-Appellee,

v.

Charles W. Anderson, as Collector, etc., Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

Judgment—Filed May 26, 1930

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, reversed, with costs. Further orered that execution issue for the collection of said costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[File endorsement omitted.]

[fol. 315] In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Order Granting Motion to Amend and Stay Mandate—Filed June 19, 1930

A motion having been made herein by counsel for the appellee to recall the mandate of this court and to amend the same by inserting a provision for judgment in favor of the plaintiff-appellee, against the defendant-appellant, in the sum of $4,126.85, and staying said mandate as amended

until the decree of the Supreme Court of the United States in the Niagara Falls Brewing case is filed:

Upon consideration thereof, it is

Ordered that said motion be and hereby is granted.

Julian W. Mack, C. J. U. S. C. C. A.

[fol. 316] [File endorsement omitted.]

[fol. 317] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 318] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, the argument and briefs to be limited to the question whether the petitioner is entitled to any deduction for obsolescence of its tangible property in the taxable years 1918 and 1919 under Sec. 234 (a) (7) of the Revenue Act of 1918. The case is advanced and assigned for hearing following No. 109, Burnet v. National Industrial Alcohol Co.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,274. U. S. Circuit Court of Appeals, Second Circuit. Term No. 352. V. Loewers Gambrinus Brewery Company, petitioner, vs. Charles W. Anderson, individually and as Collector of Internal Revenue of the United States. Petition for writ of certiorari and exhibit thereto. Filed August 16, 1930. File No. 35,274.

FILE COPY

AUG 16 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 352

V. LOEWERS GAMBRINUS BREWERY COMPANY
Petitioner,

vs.

CHARLES W. ANDERSON, Individually and as Collector of Internal Revenue of the United States,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

(The Jurisdiction Included.)

ARTHUR B. HYMAN,
KARL D. LOOS,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. ——

V. LOEWERS GAMBRINUS BREWERY COMPANY
Petitioner,

vs.

CHARLES W. ANDERSON, Individually and as Collector of Internal Revenue of the United States,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

(The Jurisdiction Included.)

May it Please the Court:

The petition of V. Loewers Gambrinus Brewery Company respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This was a suit to recover federal income and profits taxes paid by petitioner for the calendar years 1918 and 1919.

There were two questions involved in the trial Court:

1. Is the petitioner entitled to deduct from its income for the calendar years 1918 and 1919 amounts representing obsolescence of tangible assets?

2. Is petitioner entitled to deduct from its income for said calendar years amounts representing obsolescence of intangible assets?

The District Court found that if either deduction was allowed the petitioner, it would have no net income subject to tax; it thereupon allowed both deductions and entered judgment for the petitioner. The Second Circuit Court of Appeals reversed the District Court with respect to both deductions, holding on the authority of *Clarke vs. Haberle Crystal Springs Brewing Company*, 280 U. S. 384, that obsolescence on account of prohibition legislation was not allowable on either tangible or intangible assets.

This petition seeks review of the question only with respect to tangible assets. That question is now before the Court in *Lucas vs. Niagara Falls Brewing Company*, No. 61, this Term, on writ of certiorari granted April 28, 1930, to the Second Circuit Court of Appeals which, prior to the decision in the instant case, had allowed obsolescence on tangible assets of a brewery under similar circumstances. *Niagara*

Falls Brewing Company v. Commissioner, 38 Fed. (2d) 217.

The same question is also pending before this Court in *Lucas vs. National Industrial Alcohol Company, Inc.,* No. 109, this Term, on writ of certiorari granted June 2, 1930, to the District of Columbia Court of Appeals, which allowed a deduction from income of the loss in value of a brewery building resulting from prohibition legislation. (38 Fed. (2d) 718)

More specifically stated, the question here presented is as follows:

Is petitioner entitled to a deduction from its income for obsolescence of its brewery buildings, plant and equipment, which became valueless with the advent of prohibition, such deduction being claimed under Section 234 (a), sub-divisions 4 and 7 of the Revenue Act of 1918 (c. 18, 40 Stat. 1077), which allows corporations, subject to tax, in computing their net income to deduct "(4) losses sustained during the taxable year and not compensated for by insurance or otherwise * * * (7) a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence * * *."

The petitioner from the year 1879 and until October 20, 1919, was engaged in the business of manufacturing and selling beers, ales and porter, for which purpose it erected buildings in the Borough of Manhattan, City of New York, and installed the necessary machinery and equipment (R. 39). Petitioner duly filed its final income tax return for the calendar year 1918 on June 5, 1919, paying a tax in the sum of $1,339.13, as therein shown to be due (R. 36). Dur-

ing the year 1924, an additional assessment in the sum of $6,847.43 was levied against the petitioner on account of income and profits taxes for said calendar year. The said amount was paid by the respondent crediting against such additional assessment certain sums of money which the respondent had certified were over-assessed for the years 1913 to 1917, inclusive, and 1920, making a total of $2,720.58 (R. 36). The balance of $4,126.85 was paid by the petitioner under protest on June 13, 1924 (R. 37).

Petitioner duly filed its final income tax return for the calendar year 1919 on June 15, 1920 (R. 38), paying the tax therein shown to be due, amounting to $1,008.42 (R. 38). During the year 1924 an additional assessment in the sum of $10,171.41 for the year 1919 was levied against petitioner and after notice and demand the money was paid under protest on June 13, 1924 (R. 38).

The petitioner thereafter duly filed claims for refund totaling $8,186.56 for taxes paid for the calendar year 1918, and totaling $11,179.83 for taxes paid for the calendar year 1919, both based upon the claim that it was entitled to a deduction from its gross income of a reasonable allowance for obsolescence on its buildings, plant, equipment and intangible property. Said claims for refund were rejected by the Commissioner of Internal Revenue (R. 37, 38.)

An action was subsequently instituted in the District Court of the United States for the Southern District of New York for the recovery of all taxes paid for the calendar years 1918 and 1919. The District Court gave judgment to the petitioner for the full amount of the taxes paid for said calendar years and found as a fact, on uncontradicted testimony, that on

January 31, 1918, the beginning of the obsolescence period, the depreciated cost of petitioner's buildings was the sum of $153,932.18 (R. 39); that said buildings were constructed especially for the purpose of manufacturing, selling and delivering beers, ales and porter and were not commercially adaptable for any other use (R. 39); that on January 16, 1920 (the end of the obsolescence period) said buildings had no salvage value (R. 40); that as a result of prohibition and beginning on January 31, 1918, and ending January 16, 1920, the petitioner suffered a loss by obsolescence of its buildings equal to the total depreciated cost thereof, to wit: $153,932.18 (R. 40); and that over the obsolescence period, to wit: January 31, 1918, to January 16, 1920 (R. 40) such loss should be ratably apportioned. The Court further found that if a deduction was allowed for obsolescence of either tangibles or intangibles, the petitioner would have no net income subject to tax for either the year 1918 or 1919 (R. 40).

The Circuit Court of Appeals, although it had previously expressed a contrary view (*Niagara Falls Brewing Co. vs. Commissioner*, 38 Fed. (2d) 217) felt constrained to reverse the judgment below on the authority of *Clarke vs. Haberle Crystal Springs Brewing Co.*, 280 U. S. 384, the Court declaring in its opinion (R. 311) that the opinion of this Court in that case permitted of no distinction between tangibles and intangibles.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The question, whether petitioner should be allowed a reasonable deduction for obsolescence of its brewery building, plant and equipment, is now before this Court in the cases of *Lucas v. Niagara Falls Brewing Co.* No. 61, and *Lucas v. National Industrial Alcohol Co.*, No. 109, in which writs of certiorari were granted on April 28, 1930, and June 2, 1930, respectively.

2. Prior to the decision in the instant case, a deduction for obsolescence of tangibles was uniformly allowed by the Courts and by the United States Board of Tax Appeals.

3. The *Haberle Crystal Springs Brewing Co.* case *supra*, is clearly distinguishable from the instant case. In the *Haberle* case, it was held that no deduction could be allowed for obsolescence of the *good will* of a business which Congress had declared to be noxious. The decision turned upon whether the Statute included such an asset. Obsolescence of tangible assets is provided for in unmistakable terms.

4. The Circuit Court of Appeals erred in modifying the judgment of the District Court.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record, and all proceedings in the case, numbered

and entitled on its docket No. 236/1930, V. Loewers Gambrinus Brewery Co. against Charles W. Anderson, individually and as Collector of Internal Revenue of the United States, and that the said judgment of the Circuit Court of Appeals may be reviewed by this Honorable Court and that this petitioner may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioner will ever pray.

V. LOEWERS GAMBRINUS BREWERY CO.
By ARTHUR B. HYMAN,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The District Court did not render an opinion, other then the findings (R. 35-42) and the judgment (R. 54-55) which have not been reported. The opinion of the Circuit Court of Appeals for the Second Circuit was rendered on May 19, 1930, and is not yet reported. It is to be found on page 311 of the Record herein.

II.

JURISDICTION.

1. The statutory provision believed to sustain jurisdiction is Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stats. 938; U. S. C. Title 28, Sec. 347).

2. The judgment sought to be reviewed was entered May 26, 1930 (R. 313).

3. Suit in which the judgment sought to be reviewed was rendered was brought in the District Court of the United States for the Southern District of New York to recover income and profits taxes alleged to have been erroneously collected (R. 4). Judgment was there rendered for petitioner (R. 54) and respondent appealed to the Circuit Court of Appeals for the Second Circuit (R. 304) which Court reversed the judgment of the District Court and remanded the case with directions to dismiss the complaint (R. 313). Upon motion the mandate of the Circuit Court of Appeals was amended by inserting a provision for

judgment in favor of the petitioner in the sum of $4,126.85 which amount was collected by the Commissioner of Internal Revenue after the Statute of Limitations had run (R. 313).

4. Cases believed to sustain the jurisdiction are:

Haberle Crystal Springs Brewing Co. vs. Clarke 280 U. S. 384
Lucas vs. Alexander, 279 U. S. 573
Hellmich vs. Hellman, 276 U. S. 233.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading "A" in the petition and in the interest of brevity is not repeated.

IV.

SPECIFICATION OF ERRORS.

The errors intended to be urged are those specified under heading "B" in the petition and in the interest of brevity are not repeated.

V.

ARGUMENT.

Obsolescence of Tangible Assets.

The Circuit Court of Appeals erred as a matter of law in interpreting the decision of this Court in *Clarke vs. Haberle Crystal Springs Brewing Co.*, 280 U. S. 384, to mean that no allowance for obsolescence of tangible property is permissible under Section 234 (a), subdivisions 4 and 7, of the Revenue Act of

1918. The right to a deduction for obsolescence of *good will* only was involved in the *Clarke* case and only that was determined. What was said concerning the destruction of a noxious business has no application to the destruction of tangible assets. Specific provision is made in the Statute for obsolescence of tangible assets and the propriety of such allowance has never been denied.

Niagara Falls Brewing Co. vs. Comr., 38 Fed. (2d) 217
Redwing Malting Co. vs. Willcutts, 15 Fed. (2d) 626. Certiorari Denied, 273 U. S. 763.
Appeal of Manhattan Brewing Co., 6 B. T. A. 952
Appeal of Mary Dowling, 6 B. T. A. 976
Appeal of Star Brewing Co., 7 B. T. A. 377
Appeal of George Wiedemann Brewing Co., 9 B. T. A. 792
Renziehausen vs. Commissioner, 31 Fed. (2d) 675. Aff. 280 U. S. 387.

There is no specific provision in the Statute for allowance of obsolescence of intangible assets and this Court refused to read it into the statute in the *Haberle* case, *supra*. No other question was before the Court and therefore its opinion must be considered as only applicable to the point involved. It cannot be construed as indicating an intention to nullify the plain purport of this statute.

If this Court should sustain the Circuit Court of Appeals in *Niagara Falls Brewing Co. vs. Commissioner, supra*, now before it on certiorari, the petitioner will, of course, be entitled to reversal and to the affirmance of the judgment of the District Court, regardless of whether it is entitled to an allowance for obsolescence of intangible assets.

Certiorari having been granted in the *Niagara Falls Brewing Co.*, and in the *National Industrial Alcohol Co.* cases, it should also be allowed in the instant case which involves the same point. Its refusal would, of course, leave the petitioner helpless.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the correct construction of the statutory provisions relating to allowance of obsolescence as a deduction from income may be definitely settled and that the error in the construction and application of such statutory provisions in this case may be corrected; and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals of the Second Circuit and finally reverse it.

Respectfully submitted,

ARTHUR B. HYMAN,
KARL D. LOOS,
Counsel for Petitioner.

Washington, D. C.,
August 8, 1930.

FILE COPY

No. 352.

FILED
OCT 1 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

V. LOEWERS GAMBRINUS BREWERY CO., *Petitioner,*

against.

CHARLES W. ANDERSON, individually and as Collector of Internal Revenue of the United States, *Respondent.*

Reply Memorandum of Petitioner.

ARTHUR B. HYMAN,
KARL D. LOOS,
Counsel for Petitioner,
707 Munsey Building,
Washington, D. C.

Washington, D. C.,
October 6th, 1930.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

No. 352.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

V. LOEWERS GAMBRINUS BREWERY CO., *Petitioner,*

against.

CHARLES W. ANDERSON, individually and as Collector of Internal Revenue of the United States, *Respondent.*

Reply Memorandum of Petitioner.

The Respondent has filed a memorandum herein. He does not oppose the petition but suggests that the review be limited to the question whether the Petitioner is entitled to any deduction for *obsolescence* of its tangible property in the years 1918 and 1919 under Section 234 (a) (7) of the Revenue Act of 1918 and that there be excluded from review the question of the right of the Petitioner under subdivision (a) (4) of the same section to a deduction in the year 1919 of the *loss* sustained in that year by the forced discontinuance of business under prohibition legislation.

Both questions have been considered by the courts in numerous cases; both questions are before the court on grant of certiorari; the one in *Lucas v. Niagara Falls Brewing Co.*, No. 61, and the other in *Lucas v. National Industrial Alcohol Co.*, No. 109. The two questions are closely connected. Under one subdivision deduction is allowed for exhaustion, wear and tear including obsolescence, and under the other, for losses sustained.

In many important cases involving breweries and distilleries, it will be found that both questions were presented to the court. While this case was pending, the Circuit Court of Appeals rendered its decision in *Clarke v. Haberle Crystal Springs Brewing Co.*, 30 F. (2d) 219, allowing the claim of the plaintiff there to deduct a reasonable allowance for obsolescence of good will. That decision authoritatively disposed of the instant case and it was apparently unnecessary to urge in the Circuit Court of Appeals any other question than that of the right to the deduction for obsolescence. This Court reversed the *Clarke* case (280 U. S. 384) and in disposing of the instant case the Circuit Court of Appeals placed its reversal upon the ground that the decision of this Court in the *Clarke* case permitted of no distinction between tangible and intangible assets.

If that be the proper interpretation of the decision a taxpayer would have no right to recover under either subdivision of Section 234. If that be an incorrect interpretation, as we believe, a taxpayer whose capital assets have been destroyed or rendered valueless by prohibition legislation, might be held to be entitled to a deduction under either subdivision.

For that reason, it is of interest to the Government and to the people that the review by this Court encompass the whole question.

Respectfully submitted,

ARTHUR B. HYMAN,
KARL D. LOOS,
Counsel for Petitioner,
707 Munsey Building,
Washington, D. C.

Washington, D. C.,
October 6th, 1930.

FILE COPY

DEC 26 1930

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 352

V. LOEWERS GAMBRINUS BREWERY CO.,

Petitioner,

against

CHARLES W. ANDERSON, individually and as collector of Internal Revenue of the United States,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR V. LOEWERS GAMBRINUS BREWERY CO., PETITIONER.

ARTHUR B. HYMAN,
KARL D. LOOS,
Attorneys for Petitioner.

PRESS OF FREMONT PAYNE, NEW YORK CITY

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The Court below misinterpreted the decision of this Court in Haberle v. Crystal Springs Brewing Co. and misapplied it, in holding as a matter of law that a brewing company is not entitled to the deduction granted by statute for exhaustion, wear and tear, including obsolescence of its tangible property	9
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The decision of this Court in the Haberle case went no further than to declare that the allowance provided by statute for obsolescence does not apply to the good will of a business destroyed by Prohibition. This Court not only did not consider the deduction in relation to tangible property, but even reserved for future determination the question whether, under certain conditions, an allowance for obsolescence on intangibles might not properly be granted 10-11-12

The purpose of the deduction was to allow the set up of an annual reserve to take care of deterioration in value which could be anticipated with reasonable certainty in addition to the ordinary allowance for physical exhaustion. The Eighteenth Amendment and the Volstead Act resulted in the obsolescence of the tangible assets of every taxpayer engaged in the brewing of beer, ales and porter. This has been recognized by the Government and effect given to it in every regulation of the Treasury Department 12

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The changes in the various revenue acts, considered in connection with the regulations and rulings adopted pursuant thereto, make it clear that the intent of Act of 1918 was to grant to all taxpayers, in addition to the deduction for exhaustion, wear and tear, a reasonable allowance to cover deterioration in value of capital assets not encompassed within the ordinary meaning of exhaustion, wear and tear 13-14

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The theory of the deduction is that it should be sufficient, together with a deduction for normal depreciation, to return the unextinguished cost of the property less its salvage value at the end of the obsolescence period.. 14-16

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The obsolescence period has been fixed by the Bureau of Internal Revenue as beginning January 31st, 1918 and ending January 16th, 1920 17

The allowance awarded by the judgment of the trial court has admittedly been properly spread through the obsolescence period 17

The right to the deduction has been uniformly recognized.—Decisions reviewed 17-20

The taxpayer is entitled to have the asset value of tangible property left whole at the end as it was at the beginning of each taxable year. If this be not done, the allowance for exhaustion, wear and tear and obsolescence has not performed its function, and net income is distorted. This is accomplished by the reserve for exhaustion, wear and tear and obsolescence 20-24

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The judgment of the Circuit Court of Appeals should be reversed, and that of the Trial Court affirmed 24

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 352

V. LOEWERS GAMBRINUS BREWERY CO.,
Petitioner,

against

CHARLES W. ANDERSON, individually and as collector of Internal Revenue of the United States,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR V. LOEWERS GAMBRINUS BREWERY CO., PETITIONER.

This case is before the Court on a writ of certiorari granted October 20th, 1930 (R. 214), and involves a suit brought by the respondent in the United States District Court for the Southern District of New York for the recovery of Federal income and profit taxes paid for the calendar years 1918 and 1919.

Opinions Below.

Circuit Court of Appeals for the Second Circuit, Opinion, 42 F. (2d) 216; (R. 211, 212).

The District Court rendered no opinion other than Findings of Fact and Conclusions of Law (R. 22) and the judgment (R. 34).

The judgment of the District Court was in favor of the plaintiff for the sum of $22,091.01 with interest and costs (R. 34). The Circuit Court of Appeals reversed the judgment of the District Court and directed the entry of judgment for the respondent (R. 213). Its mandate was subsequently amended by inserting a provision therein for judgment in favor of the petitioner in the sum of $1,126.85, it appearing that the petitioner's right to a judgment for at least that amount was not contested (R. 213).

Jurisdiction.

This Court has jurisdiction under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stats. 938; U. S. c. Title 28, Section 347). The petitioner prayed for the writ of certiorari upon the ground that a deduction from income on account of obsolescence of tangible assets had been uniformly allowed by the Courts of the United States and by the U. S. Board of Tax Appeals prior to the decision of the Circuit Court of Appeals in the instant case, and upon the further ground that the decision of the Circuit Court of Appeals resulted from a misinterpretation of the decision of this Court in *Clarke* v. *Haberle Crystal Springs Brewing Company*, 280 U. S. 384, and was in direct conflict with its decision in *Niagara Falls Brewing Company* v. *Commissioner of Internal Revenue*, 38 Fed. (2d) 217, in which certiorari had been granted by this Court.

Question Presented.

Is petitioner entitled to a deduction from its income for obsolescence of its brewery buildings, plant and equipment which became valueless with the advent of Pro-

hibition, under Section 234 (a) Subdivision 7 of the Revenue Act of 1918 (c. 18, 40 Stat. 1077) which allows corporations subject to tax in computing their net income to deduct "(7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence" * * *?

The Statute Involved.

The Revenue Act of 1918, c. 18, 40 Stat. 1057-1077, provides in part as follows:

> "Section 234 (a). That in computing the net income of a corporation subject to the tax imposed by Section 230 there shall be allowed as deductions:
> * * * * * *
> (7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence * * *."

Statement of Case.

The findings of fact made by the Trial Court appear at pages 22 to 26 of the record. They are founded upon a stipulation of the parties (Plaintiff's Exhibit I; R. 170); upon admissions or concessions made during the course of the trial (R. 80-81); and upon a mass of uncontradicted evidence consisting of the testimony of Jacob Loewer, president of the corporation, an expert brewer; the testimony of an architect particularly qualified by long experience with brewery construction; a builder and engineer having like experience, and a consulting engineer formerly in the service of the United States. Their testimony was fortified by photographs and other evidence. The buildings were designed and constructed for brewery purposes only and their design and construction were such as to render them not only useless for other purposes, but also to make it impossible to salvage any part of them

for rebuilding purposes in the event of demolition. The equipment was of such character that it could not be removed without the destruction of the buildings themselves.

For the greater convenience of the Court the findings of fact are set forth at length. They are:

1. That at all the times hereinafter mentioned the plaintiff was and still is a corporation organized under the laws of the State of New York and having its principal place of business in the City of New York.

2. That the plaintiff on March 15, 1929 filed its tentative income and profits tax return for the calendar year 1918 and on June 5, 1919, within the extension of time allowed, filed its final income and profits tax return for the calendar year 1918, said final return showing an amount of tax due for said year in the sum of $1,339.13 and that said amount was paid to the defendant on the dates and in the amounts as follows:

March 24, 1919	$ 234.06
June 9, 1919	1,005.07
Total	$1,339.13

3. That during the year 1924 an additional assessment in the amount of $6,847.43 was levied against the plaintiff on account of income and profits taxes for the calendar year 1918. That the said amount was paid by the defendant crediting against such additional assessments the following sums which it had certified were over assessed:

For the year 1913	$ 60.00
For the year 1914	60.00
For the year 1915	60.00
For the year 1916	120.00
For the year 1917	1,055.16
For the year 1920	1,365.42
Total	$2,720.58

4. That said amount of $2,720.58 represented overpayments made by the plaintiff on account of income

and/or profits taxes for such years as indicated in the foregoing table; that the credit of said sums was duly authorized by the Commission of Internal Revenue and that after crediting said sum of $2,720.58 against said additional assessment there remained an amount unpaid on said additional assessment of $4,126.85; that said amount of $4,126.85 was paid by plaintiff under protest on June 13, 1924.

5. That the total income and profits taxes paid by the plaintiff on account of the year 1918 amounted to $8,186.56.

6. That thereafter the plaintiff duly filed claims for refund for the total amount of $8,186.56 paid by it as income and profits taxes for the calendar year 1918 and said claims for refund were based upon a claim of right to deduct from income additional amounts on account of allowances claimed for obsolescence in respect of brewery buildings and intangible property and that said claims for refund were rejected by the Commissioner of Internal Revenue. Plaintiff also duly filed an amended claim for refund upon the ground that collection of the additional amount paid on June 13th, 1924, was barred by the statute of limitations in such cases made and provided. No action has been taken by the Commissioner of Internal Revenue upon said amended claim and more than six months have elapsed since its filing.

7. That the net income and profits taxes for the calendar year 1918 assessed against plaintiff as aforesaid were based upon a net income of $56,832.02 determined by the Commissioner of Internal Revenue and that in arriving at such net income the Commissioner allowed no deduction whatsoever on account of obsolescence in respect to brewery buildings or intangible property.

8. That the plaintiff on March 11, 1920 filed its tentative income and profits tax return for the calendar year 1919, and on June 15, 1920, within the extension of time allowed, filed its final income and profits tax return for the calendar year 1919, said final return showing an amount of tax due for said year in the sum of $1,008.42 and that said amount was paid to the defendant on the dates and in the amounts as follows:

March 16, 1920	$252.90
June 29, 1920	756.32
Total	$1,008.42

9. That during the year 1924, an additional assessment of $10,171.41 was levied against the plaintiff on account of income and profits taxes for the calendar year 1919, that said amount was paid by plaintiff to defendant under protest on June 13, 1924.

10. That the total income and profits taxes paid by plaintiff on account of the year 1919 amounts to $11,179.83.

11. That on June 24, 1924, plaintiff duly filed claims for refund in the amount of $11,179.83 representing total income and profits taxes theretofore paid by the plaintiff for the calendar year 1919. That said claims for refund were based upon a claim of right to deduct from income additional amounts on account of allowances for obsolescence claimed in respect of brewery buildings and intangible property. That said claims for refund were rejected by the Commissioner of Internal Revenue.

12. That the income and profits taxes for the calendar year 1919 assessed against the plaintiff as aforesaid were based upon a net income of $74,838.77, as determined by the Commissioner of Internal Revenue; that in arriving at said net income the Commissioner allowed no deduction whatsoever on account of obsolescence in respect of brewery buildings or intangible property.

13. That the plaintiff since the year 1879 and until October 29, 1919, has been engaged in the business of manufacturing and selling beers, ales and porter for which purpose it erected buildings and installed the necessary machinery and equipment in the Borough of Manhattan, City of New York, and in which its operations were carried on at all the times involved in this action.

14. That on the 31st day of January, 1918, it had become a matter of common knowledge and was known to the plaintiff that prohibition would become the law of the land and that as a result of such law

persons engaged in the business of manufacturing and selling beers, ales and porter including this plaintiff would suffer obsolescence in the value of their capital assets, and such prohibition became effective January 16, 1920.

15. That at January 31, 1918, the depreciated cost of buildings used by the plaintiff in its manufacturing operations as found by the Commissioner of Internal Revenue was the sum of $153,932.18. That said buildings were constructed especially for the purposes of manufacturing, selling and delivering beers, ales and porter and were not commercially adaptable for any other use.

That at January 16, 1920, such buildings had no salvage value.

15. That as a result of prohibition and beginning January 31, 1918, and ending January 16, 1920, the plaintiff suffered obsolescence of said buildings equal to the total depreciated cost thereof, to wit: $153,932.18 which should be rateably apportioned over such period.

16. That the plaintiff had built up a valuable trade in the products which it manufactured. That such trade was of the value on March 1, 1913, and at January 31, 1918, of not less than $200,000. That as a result of prohibition the plaintiff suffered obsolescence in the value of its trade equal to the total thereof, to wit: not less than $200,000 which should be apportioned rateably over the obsolescence period, to wit: January 31, 1918, to January 16, 1920.

17. That after making provision for the allowances for obsolescence of either tangible or intangible property as set forth above the plaintiff had no net income for either of the years 1918 or 1919 and that all sums of money paid by it as and for income and excess profits taxes for such years were erroneously and illegally collected.

18. That the sum of $4,126.85 paid under protest by the plaintiff on June 13, 1924, on account of the additional assessment of taxes made by the Commissioner of Internal Revenue against it as and for the year 1918 as hereinbefore set forth was so paid more than five years after the filing of the plaintiff's return for such year.

It was stipulated or admitted at the trial that the depreciated cost of the buildings upon which obsolescence, if any, was to be allowed for 1918 and 1919 was $153,932.18 and that such allowance was properly spread in the findings (Appellant's Brief below, pp. 6 and 15).

ARGUMENT.

Under Section 234 (a) (7) of the Revenue Act of 1918, a brewing company was entitled to deduct from its income for the years 1918 and 1919 a reasonable allowance for exhaustion, wear and tear, including obsolescence, of its buildings and equipment, it having become certain prior to that time that their useful life would be terminated by January 16, 1920, because of prohibition legislation.

Legal Recognition of the Deduction.

The Statute provides that in computing the net income of a corporation subject to the tax imposed by Section 230, there shall be allowed as a deduction, "A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence." For a considerable period of time there was wide disagreement as to whether the statutory allowance covered intangible as well as tangible property. That question was set at rest by the decision of this Court in *Clarke* v. *Haberle Crystal Springs Brewing Company*, 280 U. S. 384. The application of the Statute to tangible property has never appeared to be in doubt until the decision of the Circuit Court of Appeals in the instant case, although the right to the deduction in specific cases may have been denied upon the merits.

Article 143, 161 and 162, Regulations 45 (1919)—
Revenue Act of 1918;

Article 143, 161 and 162, Regulations 62 (1922)—Revenue Act of 1921;
Article 143, 161 and 162, Regulations 65 (1924)—Revenue Act of 1924;
Article 143, 161 and 162, Regulations 69 (1926)—Revenue Act of 1926;
Article 201 and 202, Regulations 74 (1929)—Revenue Act of 1928;
A. R. R. 963, 1-1 C. B. 161;
Niagara Falls Brewing Co. v. *Comr.*, 38 Fed. (2d) 217, Certiorari granted;
Redwing Malting Co. v. *Willcutts*, 15 Fed. (2d) 626, Certiorari denied, 273 U. S. 763;
Appeal of Manhattan Brewing Co., 6 B. T. A. 952;
Appeal of Mary Dowling, 6 B. T. A. 976;
Appeal of Star Brewing Co., 7 B. T. A. 377;
Appeal of George Wiedemann Brewing Co., 9 B. T. A. 792;
Renziehausen v. *Commissioner*, 31 Fed. (2d) 675, Aff. 280 U. S. 387;
Milwaukee Brewing Co. v. *Comm.*, 15 B. T. A. 579;
Appeal of Konrad Schreier Co., 9 B. T. A. 407;
Appeal of Northern Hotel Co., 2 B. T. A. 1099.

The Theory of the Court Below.

After espousing a contrary view for many years, the Government contended in the instant case that the retention and use of the tangible property involved precluded the allowance of the deduction. It was not however upon this theory which it had just repudiated (*Niagara Falls Brewing Company* v. *Comm.*, *supra*) that the Circuit Court of Appeals reversed the judgment of the Trial Court, but because in its view the decision of this Court in *Clarke* v. *Haberle Crystal Springs Brewing Company* left it no alternative.

Haberle v. Crystal Springs Brewing Co. Distinguished.

We think the error of this view is manifest. In the Haberle case this Court was dealing with the question of whether under Subdivision (a) (7) of Section 234 of the Revenue Act of 1918, a brewing company is entitled to claim the obsolescence deduction in respect of its good will. True the language of this Court in the Haberle case was very broad, but when confined to the subject to which it was addressed, it does not justify the assumption that what was said was intended to apply to tangible as well as to intangible assets. In arriving at its conclusions in the Haberle case the Court was confronted with a statute that made no direct provision for obsolescence of good will. It declined to read such a provision into it, or to interpret the language found, to include it, deeming it plain that Congress could not have intended to afford compensation by abatement of taxes for the loss of good will of a business it had destroyed as noxious.

For the condemnation of the "business" regarded as noxious no compensation was provided and it seemed plain to this Court that Congress could not have intended to afford compensation in the form of abatement of taxes. Did that view not result, however, from the absence of any direct language in the subdivision granting such abatement? Suppose the statute had provided for "a reasonable allowance for exhaustion, wear and tear of assets used in the trade or business including good will" could, or would, this Court have disregarded its plain mandate? The answer, we think, is obvious. If therefore it be plain that in the absence of definite pronouncement to that effect, Congress could not be deemed to have intended an abatement of taxes for obsolescence of good will, it would appear to be equally plain, that in the absence of any exception in the Statute, the definite grant of the allowance in respect to tangible property, is available to all persons alike.

The refusal of this Court to read into the Statute, language that was absent, clearly does not justify the notion that it read into the Statute other language that was also absent.

The opinion below imputes to this Court, the promulgation of a remarkable doctrine. It is that either there is no deduction for obsolescence in any case, which this Court certainly did not say and we are sure could not have intended since the statute makes plain provision for it; or that, though the deduction is in terms accorded to *every* corporation subject to the tax, a company engaged in the brewing of beer is not entitled to it. This latter imputation is as little justified by the opinion of this Court, as the former. The deduction is in terms accorded to *every* corporation subject to the tax; there are no exceptions. The subdivision deals with income not with persons. It would seem, but for the decision below, inconceivable that such a construction could be placed upon the opinion in the Haberle case: the more so when we consider the results that would naturally follow.

A brewing company is either entitled to all the statutory deductions or to none of them. If it be not entitled to the obsolescence deduction, it is not entitled to the depreciation deduction, to the deduction for bad debts, to the deduction for losses by fire or other casualty, to the deduction for taxes or expenses of operation. There is no more justification for the withholding of the one than of any of the others. It would follow, therefore, that such a corporation must be taxable on gross income instead of net (as the statute provides) or not taxable at all. It seems unnecessary to prolong such an argument.

A proper reading of the opinion in the Haberle case, it seems to us, should have prevented such a result as has been reached below. This Court said * * * "In our opinion the words now used cannot be extended to cover the loss in *this* case and it is needless to speculate as to what other cases it might include."

In our view, this Court made it plain that cases might well arise where even a deduction for obsolescence of intangibles might be allowable. How, then, can it possibly be said that its decision precluded the allowance for obsolescence of tangible assets for which specific provision is made, when, in fact, the Court, confined itself strictly to the case before it and left open for the future, the determination of whether the deduction even for intangibles might not in some cases be allowable.

Much stress is laid upon the reference to the brewing business as "noxious." Here again, it seems to us, the Court below misconceived the application of the reference. If as this Court said, the "business" was regarded by Congress as noxious, which of course is true, did this Court say that it regarded buildings and automobiles and fixtures and machinery, inoffensive in themselves, as "noxious" also. We think not. If Congress had intended to deny to any corporation, the benefit of the deductions set forth in Section 234, we think this Court would insist upon a statutory expression to that effect, before it made so invidious a distinction. We feel justified therefore in asserting that this Court used the word noxious as applying to a "traffic" in liquor and not to the buildings in which a part of such "traffic" had its origin.

Assuming therefore that the Court below erred in extending the scope of the Haberle decision beyond the point there decided, we proceed to a discussion of the merits of the instant case.

The object of the Statute was to tax net income in a given period of time. To reach net income certain well recognized deductions from gross income are necessary. We are here dealing with one of the most common of these, the depreciation deduction, and its blood relative, the obsolescence deduction. The statutory history of the provision is interesting and enlightening.

Statutory History.

The Excise Tax Act of 1909 permitted the deduction of "a reasonable allowance for depreciation of property, if any" (Section 38, Paragraph 2). Regulations 31, Article 4 construed that deduction as covering obsolescence. The 1913 Act Limited the deduction somewhat by providing for "a reasonable allowance for depreciation by use, wear and tear of property, if any." Section G (b), Regulations 33, Article 192, continued to hold obsolescence an allowable element under this subdivision. The 1916 Act made a significant change in the provisions of the previous Act. The word "depreciation" was dropped and the deduction permitted was changed to a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the trade or business (Section 12a). This definitely excluded obsolescence and recognizing this, Regulations 33 (revised) Article 178, excluded obsolescence.

This was the history of this provision up to the time when Congress began consideration of the 1918 Act. The House in originating this Act wrote the provision for this deduction in the language contained in the 1916 and 1917 Acts, namely, an allowance for "exhaustion, wear and tear of property." The Senate Finance Committee proposed an amendment striking out the words "exhaustion, wear and tear" and substituting the word "depreciation." This was evidently to restore the status existing before the 1916 Act was passed, encompassed within the regulations of the department, holding obsolescence to be allowable under the term "depreciation." However, the proposed amendment went to conference and apparently for the purpose of making sure that there could be no doubt about the right to the obsolescence deduction, the conferees struck out the word "depreciation," reinserting the words "exhaustion, wear and tear," and adding the words "including a reasonable allowance for obsolescence."

That the purpose was to allow a set-up by way of an-

nual reserve to take care of a depreciation in the value of assets which could be anticipated with reasonable certainty in addition to the ordinary allowance for physical exhaustion is too apparent to permit of extended argument and the decisions of the Bureau, their regulations, the decisions of the U. S. Board of Tax Appeals and the Courts establish that this is so.

It is well settled that obsolescence may and does result from progress in an act, change of style and *legislation*. That the legislation encompassed within the 18th Amendment and the Volstead Act, created such a result cannot be denied. It has been recognized by the respondent and effect given to it in the Regulations.

Art 143, Reg. 45;
T. B. R. 44, 1 C. B. Aug. 1919, 133-7;
A. R. M. 34, 2 C. B. 31.

In the Appeal of Manhattan Brewing Co., supra it said:

> "Obsolescence is defined in Webster's New International Dictionary as 'state of becoming obsolete' and obsolete is defined as 'no longer in use'; 'neglected.' Obsolescence can be distinguished from 'wear and tear' in that wear and tear refers to the physical condition, while obsolescence refers to disuse and disappearing value arising from some extrinsic or external causes, such as progress in an art, change of style, or *legislation*. Machinery may be in good physical condition, but, by reason of change of style or progress in the art in which it is employed, be obsolete or in a state of obsolescence. It should be noted that obsolescence is defined as the state of *becoming obsolete, and does not necessarily imply that the disuse should be completed.*"
>
> *Milwaukee Brewing Co.* v. *Comm.*, 15 B. T. A. 579-82.

Theory of the Deduction.

The theory of the obsolescence deduction is that it should be sufficient together with a deduction for normal

depreciation, to return the unextinguished cost of the property less its salvage value at the end of the obsolescence period. We think the propriety of that statement will not be questioned.

Accountants, engineers, lawyers and business men appreciate that certain assets are of a depreciable character; that there is a progressive diminution in value. The accountant's theory which has been adopted by Congress is that this indefinite but nevertheless certain element must be taken care of by a reserve or deduction made annually so that the capital value will be returned at the end of an arbitrarily fixed period. Nobody would be stupid enough to say that at the end of the depreciation period the property, of necessity, has no value. Everyone knows that the contrary is more likely to be the fact. For example, an accountant might set a depreciation charge of five per cent annually. At the end of twenty years the total charges would reflect the total capital loss sustained but at no point between the beginning and the end of the twenty year period, except by merest accident, would such depreciation reflect the actual loss sustained up to that date. Nor would his depreciation coincide at any point with the amount of loss computed on the proportionate efficiency or saleable value. The efficiency of a machine which has been in use for a few months is often greater than that of a new one and at no time does its efficiency fall below seventy-five per cent, because below that point it is unserviceable. On the other hand, from the point of view of saleability, a machine drops from new to second hand value, a loss which may be over fifty per cent, after a few days' use. Thus, the depreciation allowance has not the slightest relation to an actual or sustained loss.

If then, we change the words "exhaustion, wear and tear" to "obsolescence," do we not have precisely the same situation? What is the result? The Government recognizes that it must have some reasonable system of account-

ing. It is by such a system of accounting that income is determined. In the illustration given, the deduction for exhaustion ceases the moment the capital value is returned and thereafter the taxpayer reports his income without deduction of that item. If he sells the property thereafter he reports as income the full sales price. It has been pointed out that the whole purpose of granting obsolescence was to prevent the necessity of waiting for complete loss and thus compelling the taxpayer to write off in one year a sum far in excess of the income against which it could be written off; in which latter event the taxpayer suffers not only the loss of his property, but also is denied a chance to write if off against income.

Obsolescence and Accelerated Depreciation.

Obsolescence has been defined by the Board of Tax Appeals as a state of becoming obsolete. That definition, while it may be said to be accurate, is not helpful. What is the *practical* meaning of the word? It has been insisted that as used in the Statute it is a word of enlargement of exhaustion, wear and tear (*Redwing Malting Company* v. *Willcutts*, 15 F. (2d) 626; *Appeal of the Manhattan Brewing Company*, supra). Viewed from that standpoint, it adds to the allowance for exhaustion or depreciation. If an asset is depreciable under normal conditions over a period of let us say ten years and some unusual economic upheaval occurs to hasten the normal end of the assets subject to depreciation, an additional allowance is proper, indeed necessary, to return capital value of the asset. The result is an acceleration of depreciation, such as granted in the case of buildings and machinery where the state of the art has changed.

The Board of Tax Appeals has held that no mathematical formula is to be used to the exclusion of facts. *Otis Steel Company*, 6 B. T. A. 358, 364. The inquiry in all cases is—over what period of time in the particular case is the captial value to be returned?

The Obsolescence Period.

The Bureau of Internal Revenue, recognizing that the 18th Amendment created an economic upheaval in relation to assets used in a trade or business subject to its condemnation, justifying a claim for obsolescence in addition to normal depreciation fixed the period over which the deduction therefor was to be taken as beginning January 31, 1918, and ending January 16, 1920.

T. B. R. 44, 1 C. B. August 1919, 133-7 A. R. M. 34 2 C. B. 31;
Haberle v. Crystal Springs Brewing Co., 30 Fed. (2nd) 219;
Appeal of Manhattan Brewing Co., 6 B. T. A. 952;
Milwaukee Brewing Co. v. Comm., 15 B. T. A. 579-82.

In line with this, it is admitted that the deduction in the instant case, if allowable, has been properly spread through the period prescribed by the Bureau.

Decisions Reviewed.

The right to the deduction appears to have been uniformly recognized.

National Ind. Alcohol Co. v. Commissioner, 38 Fed. (2d) 718, Certiorari granted;
Appeal of Manhattan Brewing Co., 6 B. T. A. 952;
Appeal of Mary Dowling, 6 B. T. A. 976;
Appeal of Star Brewing Co., 7 B. T. A. 377;
Appeal of George Wiedemann Brewing Co., 9 B. T. A. 792;
Renziehausen v. Commissioner, 31 Fed. (2d) 675. Affirmed 280 U. S. 387;
Appeal of J. Christian G. Hupfel, 9 B. T. A. 944.

In *Renziehausen v. Commissioner*, supra, a deduction was allowed for obsolescence on storage warehouses due

to Prohibition. This allowance was affirmed in the Circuit Court of Appeals and in this Court.

In that case the Board had held that obsolescence began as to warehouses used and usable only for the storage of whiskey when the Willis Campbell Act was passed on November 23, 1921. The Government urged that the taking of the loss should be postponed to a time when all whiskey should have been removed from the warehouse. The Board held that the deduction should be spread over the year 1921 and subsequent years as the removal took place. It held that the distillery itself became obsolete in that year and that the loss from that source was deductible. It thus decided that where the loss was final in the case of obsoleteness it should be taken off in the year in which the assets became obsolete and spread over a period of years as to assets continued in use. Thus the Board recognizes the Subdivision of Section 234 applying to losses sustained in trade and also the Subdivision providing for a reasonable allowance for obsolescence.

In *National Industrial Alcohol Co.* v. *Commissioner*, 38 Fed. (2d) 718, it appeared that in November of 1919 the appellant abandoned the manufacture of beer and the use of its trade-name and entered upon the business of manufacturing near beer. It subsequently began the manufacture and sale of industrial alcohol and in 1923 discontinued the near beer business. The plaintiff claimed that it had abandoned two floors which had no residual or salvage value. The Circuit Court of Appeals held that this contention was amply sustained, it appearing that the building was unsuitable for any other purpose and that the only use made after the abandonment of the brewing of beer was of the first floor for the manufacture of cereal beverages. The Court said,—"A loss may become complete enough for deduction without the taxpayer's establishing that there is no possibility of an eventual recoupment. * * * The Taxing Act does not require the taxpayer to be an incorrigible optimist," citing *U. S.* v. *S. S.*

White Mfg. Co., 274 U. S. 398. The distinction between that case and others is of course that the abandonment was actually claimed by the taxpayer and the allowance by the Circuit Court of Appeals was of the loss sustained and not of a claim for obsolescence.

The leading case decided by the United States Board of Tax Appeals is that of the *Appeal of the Manhattan Brewing Co.*, 6 B. T. A. 952. In that case, which was almost identical with this, an obsolescence deduction for the year 1918 of $255,488.56 was allowed on the tangible assets. The Board said "Obsolescence is recognized by Statute. • • • It remains, then, for us to determine whether the amount so written off and deducted comes within the requirements of reasonableness as set forth in the law. There is no question as to the value of the property. The period of obsolescence extending from December 18, 1917, to January 16, 1920, is equally well established. Prohibition at an early date was almost a certainty. We are convinced that the amount of $255,488.56, determined by the petitioner, was a reasonable measure of the obsolescence of its tangible property during the year 1918. (*Appeals of Michigan Lithographing Co.*, 1 B. T. A. 989, *Robert H. McCormick*, 2 B. T. A. 430, *Auditorium Co.* v. *Commissioner*, 5 B. T. A. 163.)

In *Appeal of George Wiedemann Brewing Co.*, supra, the Board considered a claim concerning the obsolescence of tangible assets rendered useless by prohibition. There, as here, the depreciated cost according to the books was accepted by the respondent and therefrom he deducted the amount of the salvage value estimated by the petitioner, considering the remainder the amount of loss due to obsolescence. The petitioner concluded that its estimate of salvage value grossly overstated the truth and asked for an increase in the allowance. The Board sustained the petitioner and increased the allowance in accordance with its contention. The parties differed as to the proper method of pro-rating, the Commissioner contending that

the proper period for the spread was January, 1918, to January, 1920. The petitioner claimed it as a loss in 1919. The Board held that the obsolescence period actually set in in January, 1918, that the assets had suffered special obsolescence through 1918 to the beginning of the fiscal year 1919. It limited the period therefore to the date in 1919 when brewing was discontinued.

In the *Appeal of J. Christian G. Hupfel Co.*, supra, the Board allowed obsolescence of buildings, taking the obsolescence period as the date when it began liquidation to the date when the obsolescence period ended, to wit, January 16th, 1920. In that case, petitioner had determined to liquidate its business. Its buildings originally erected as brewery units, contained many features which precluded their adaptation to other commercial uses without considerable demolition and reconstruction. It continued to use the buildings long after the end of the obsolescence period and did not start reconstruction until 1921. The Board held that the continued use of the buildings after the period of obsolescence had run, did not militate against the allowance of an obsolescence deduction therefor. In that case it is to be noted it was conceded that the taxpayer was entitled to an allowance for obsolescence of its equipment. If in the Hupfel case the taxpayer was entitled to its claim for obsolescence, there can be no gainsaying the right of this petitioner to the same relief. This petitioner is in a far stronger position. None of its buildings involved here are adaptable to other commercial uses even by alteration. Their value is nil.

The Deduction in Relation to the Taxable Period.

A unit of time (a year) is an essential factor in statutory taxable net income. That factor makes a vast difference in many ways. Without it we may study net income ad infinitum either as an abstraction or as an actuality and we will make only partial progress toward the

determination of the statutory taxable net income. As a matter of fact, there is little, if any, relationship between the amounts of net-income, per se, and Net-Income-in-a-Unit-of-Time.

To determine Net Income in a given unit of time we are to deduct a reasonable allowance for the exhaustion, wear, tear and obsolescence of property. Any "reasonable allowance" is initially a philosophical and not a mathematical study. Whether the deduction be for the tax-free return of a capital investment over the period of its useful life or be the measure of asset consumption by business operation is not here to be argued.

For the finding of net income, per se, the deduction is of little difficulty. The value of all capital investment is left whole, at the end as at the beginning. The difficulty begins when the essential factor of the Unit-of-Time comes into play and we must determine not merely net income but net-income-in-a-unit-of-time.

The method currently favored for computing this deduction for a unit of time is, quite naturally the simplest one, that of pure mathematics. Divide the capital investment by the years of its life and allocate the quotient to each year. This is so-called "straight line" method, the product of accounting thought and supported by accounting practice. But (and here we approach the nub of this controversy), the statute says nothing about the straight line method or any other method for computing the deduction. Nor is there any philosophical basis for confining the deduction for a given unit of time to a mathematical proportion of the total investment to be returned. The term "reasonable" is exclusive only of that which is unreasonable, and the straight line method does not, and cannot be claimed to, yield the sole reasonable result. In fact, its only claim to reasonableness is its simplicity and its eventual completeness. It has a philosophical excuse only through ignoring the unit-of-time factor and computing net income per se for the entire transaction or opera-

tion, maybe decades in duration. It results in a deduction for a given unit of time which is of very questionable reasonableness. Its premise is that exhaustion, wear, tear and obsolescence of an asset is equal for every equal unit of time. As a matter of actual fact, the wear and tear on a given machine, for example, for a given year has no real relationship to the wear and tear for the next year or the prior year or the tenth year therefrom. Only if the causes of wear and tear, such as hours of use, suitability to use, skill of operation, persistence of upkeep, expertness of repair, weather and many other elements, be the same in two different years, is the wear and tear the same. Only by accident does the result of the straight line method coincide with the truth in determining this deduction for net-income-in-a-unit-of time. It would be exactly as reasonable to compute gross income over the term of business operation and divide by the number of years to find the gross income for a given year. There is no distinction; neither is more reasonable than the other.

The proposition that this deduction is to return tax-free the capital investment means, of course, a return of equivalent values and not a return of identical substance. The taxpayer is to have at the end of the life of his building a value, in money or reinvestment, equivalent to the initial value of his building.

Deduction Has No Relation to Physical Substance.

Note that as applied to physical assets, one-half of the clause providing this deduction relates to physical substance and the other half relates solely to value. Exhaustion, wear and tear of physical assets is physical deterioration, dissipation or consumption. But obsolescence has no bearing upon the physical existence or condition of the asset. Obsolescence is the destruction of value by the impact of economic factors, and its complete annihilation of asset-value may leave the asset-substance unchanged. A machine totally superseded by a newer, better machine

and of no value save as junk, may nevertheless be in a state of physical perfection. The deductible allowance is to permit to the taxpayer tax free a *value* equivalent to the total original capital investment in the machine.

In the instant case it has been determined that within the years 1918 and 1919 economic forces, which petitioner names and describes, destroyed a certain value of its assets, the amount of which has been adjudged. Its net income for those years cannot be accurately fixed unless it has returned to it tax free at the end of each unit of time a value equivalent to the initial value of its asset.

If the taxpayer be not made whole at the end of that unit of time, the allowance has not performed its function and net income for that time has been to that extent distorted. If the problem under the statute were to determine the net income for the full life of the assets or for a business operation or a specific transaction, the particular problem here involved might not arise. But the statute introduces into the general problem the vastly important element of one year as a unit of time by which the whole study is limited and controlled. The facts as to that particular year are the pertinent facts and the only pertinent facts to be considered.

To deny petitioner's contention is not only to distort net income for the current year but for all subsequent years until the physical lives of the assets expire. Unless this destruction of value be made good presently it must be later. So to do puts on the later years the burden of returning tax free to the petitioner from their incomes a capital investment already long since destroyed; it creates a hiatus during which the petitioner is without his full initial capital investment value; it shifts to a later year a proper charge against a former; it is as improper as the shifting of an expense or a bad debt from the year of its occurrence to a later year.

This controversy really reduces itself to the question whether, as we contend, the petitioner is entitled to have

tax free at the end of each taxable unit of time a value equivalent of its initial capital investment.

It is of course clearly true that in a vast majority of cases it is impossible or impractical to determine just what portion of its initial capital investment value remains to the petitioner in the original substance and, therefore, to determine exactly the value to which the petitioner is entitled tax free out of gross income. But that is a difficulty of practice and not of principle and is not present here.

These views we contend are sound. The judgment of the Trial Court sustains them and that judgment would have been affirmed by the Circuit Court of Appeals but for its conception of the views of this Court in Haberle v. Crystal Springs Brewing Company. Unless this Court holds that the right to the deduction is to be denied to a particular class, the judgment of the Trial Court was right and should be affirmed.

Respectfully submitted,

ARTHUR B. HYMAN,
KARL D. LOOS,
Attorneys for
V. Loewers Gambrinius Brewing Company,
Petitioner.

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JAN 22 1931

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 352.

V. LOEWERS GAMBRINUS BREWERY CO., *Petitioner*,

vs.

CHARLES W. ANDERSON, individually and as collector of Internal Revenue of the United States, *Respondent*.

REPLY BRIEF.

ARTHUR B. HYMAN,
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Attorneys for petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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OCTOBER TERM, 1930.

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V. LOEWERS GAMBRINUS BREWERY CO., *Petitioner,*

vs.

CHARLES W. ANDERSON, individually and as collector of Internal Revenue of the United States, *Respondent.*

REPLY BRIEF.

ARGUMENT.

Abandonment is Not a Prerequisite to the Deduction of a Reasonable Allowance for Obsolescence.

It is contended by the Government that *any use* by a taxpayer of property with reference to which the obsolescence deduction is claimed precludes the allowance of the claim. (*Burnet v. Niagara Falls Brewing Co.*, No. 61).

The statute, Section 234, the decisions of the Bureau, of the Board of Tax Appeals, and of the Courts are to the contrary.

Appeal of Manhattan Brewing Co., 6 B. T. A. 952.
Appeal of George Weidemann Brewing Co., 9 B. T. A., 792.
J. F. Chris. G. Hupfel, 9 B. T. A. 945; O. D. 125, C. B. 1, 133.
American Valve Co., 4 B. T. A. 1204.
Kansas City Title & Trust Co., 35 Fed. (2nd) 351.
Conley Tin Foil Co. v. Comm., 17 B. T. A. 65.

If the question were an open one the argument lacks reason to support it. It is never required that one abandon or destroy property in order to obtain relief concerning it. On the contrary the law imposes the duty upon every one to minimize loss, and the natural human instinct to do so was exemplified by the vain efforts of the brewers generally to turn their plants to other profitable uses. Their failure is history and is told in the record. We do not consider the question to be one requiring extended argument.

The statute provides for an *allowance* for obsolescence. The very notion encompassed within the use of that word, is that it is something to be taken *before* abandonment, since at that time, obsolescence will have ripened into obsoleteness and the loss which then becomes fixed and definite is provided for in a different subdivision (234 (a), 4).

It is to be noted that as to both depreciation and obsolescence, the language is the same. There is to be a *reasonable allowance* to cover both. If the argu-

ment of the Government is to be taken seriously, it must be extended to cover depreciation as well as obsolescence. Will the Government press the argument that far and claim that there can be no depreciation deduction? The use of the language contained in the subdivision granting an allowance both for depreciation and obsolescence prevents the application of the theory now advanced by respondent's counsel.

The Bureau of Internal Revenue itself formerly entertained a contrary view. The Committee on Appeals and Review, a tribunal established by the Treasury Department in its opinion in the Great Lakes Steamers Case, A. R. R. 963 I-1, C. B. 161, says:

> "As this (Article 178 of Regulations 33, Revised) resulted in throwing the total deduction for obsolescence as distinguished from depreciation, into one year, it frequently happened that the then income was less than the allowable deductions and the cost or the March 1, 1913, value was not fully returned to the taxpayer. To relieve in a measure this situation, Congress provided for a recognition of obsolescence as a progressive process as distinguished from obsoleteness which was an accomplished status."

In the appeal of the Manhattan Brewing Co., 6 B. T. A. 952, it is said:

> "Obsolescence is defined in Webster's New International Dictionary as 'state of becoming obsolete' and obsolete is defined as 'no longer in use'; 'neglected.' Obsolescence can be distinguished from 'wear and tear' in that wear and tear refers to the physical condition, while obso-

lescence refers to disuse and disappearing value arising from some extrinsic or external causes, such as progress in an art, change of style, or *legislation.* Machinery may be in good physical condition, but, by reason of change of style or progress in the art in which it is employed, be obsolete or in a state of obsolescence. It should be noted that obsolescence is defined as the state of *becoming obsolete, and does not necessarily imply that the disuse should be completed.*''

Fallacy of Government's Theory.

To illustrate the fallacy of Respondent's theory, take for example, the case of a brewing plant erected in 1916 and assume a life of 40 years which would entail a straight line depreciation over that period. Prohibition comes along in 1918. This change in condition necessitates a revision of the depreciation spread in equal installments over the period as originally fixed. Depreciation must be accelerated to take care of the new element which has intervened. The value which would have been attributed to the plant in the sixth, seventh and following years, can no longer by any possibility exist. The fact must be recognized. Appreciation of it is to be found in the statute itself. The direct inquiry then is—how much of the slack must be taken up in each year so as not to distort either capital or income? Let it be shown that because of the new element which has been injected into the picture the value of the plant which would have been 90 per cent, under normal conditions, at the end of the fourth year of its life, will in fact be only 10 per cent at that time; what is to be done with the loss in the value of the plant which has suddenly taken place? Nothing that may be done can change

the basic fact that the property at the end of the fourth year has only a salvage value instead of the value it would have had but for the change in conditions. Its continued use has not the slightest bearing thereon. Whether it be abandoned or not, the capital asset has shrunk in value over a shorter period of time than was considered to be its normal life. The statute provides for just that situation. The Board of Tax Appeals and the Courts have repeatedly given effect to it. The loss in value must be absorbed over the period of years during which it is occurring. Abandonment or use has nothing to do with the matter.

In the case of Niagara Falls Brewing Co. v. Commissioner, here on Certiorari to the Second Circuit Court of Appeals, the theory that abandonment was a prerequisite to the allowance was repudiated.

It is obvious that obsolescence is a process leading gradually, or rapidly, dependent upon the inducing cause, to the dissipation of commercial value of assets. It would be a poor system of accounting that failed to take note of this and to compensate it by a proper reserve or deduction from income. In this respect there is no distinction between the depreciation and the obsolescence deductions. It would be a complete distortion of income to await total loss and to take the deduction then when in fact the loss was sustained not then but over a period of years during which the process was continuing. It is a strange anomaly that in the case of depreciation the Government insists upon the annual deduction in each accounting period while in the case of obsolescence, it declines to allow it. We look to it to point out the distinction.

The Facts Warrant the Deduction.

The respondent contends that even if as a matter of law the deduction is allowable, it is not so in the instant case, because, it says, it was not reasonably certain that such obsolescence would result from the 18th Amendment.

The answer to that is not only in the findings but also in the very convincing fact that it was foreseen sufficiently to cause the petitioner to deduct from net income in 1918, a reasonable allowance for obsolescence upon its books and upon its return of income. The respondent concedes that it was a matter of common knowledge at January, 1918, that prohibition would become effective and that this was known to petitioner. The Bureau of Internal Revenue declared this to be so and definitely fixed the period over which the obsolescence deduction was to be spread. *It is conceded by the respondent in the instant case that it has been properly spread in the findings of the District Court.* Why the instant case should be an exception to the general rule is not pointed out.

The respondent persists in confusing physical and commercial deterioration. We have pointed out in the original brief that depreciation relates to physical substance while obsolescence refers to value only. The physical substance may remain practically unchanged in condition when the commercial value is rapidly disappearing. Income has to do with value, not with physical condition.

It is, therefore, unimportant that some use was made of a part of the buildings. If a great plant having a rental value of $50,000 per annum can be used only as a dump for the storage of coal and wood, at a rental of $5,000 per annum, does this not clearly indicate that obsolescence has taken place

rather than the contrary as the respondent urges. One might well be mistaken in the first instance in assuming that obsolescence has set in. When subsequent events, however, conclusively demonstrate the correctness of the assumption, no argument will suffice to show that the assumption was unjustified.

In passing, the respondent adverts to the fact that the petitioner insured the buildings as indicating its *belief* that some value was there. While the record shows that petitioner insured its entire plant as a whole (buildings, fixtures, machinery) the fact is merely evidentiary, to be weighed with all the other evidence, and the overwhelming evidence accepted by the trial Court shows that the *buildings* were in fact utterly valueless. *The point to be determined by the Court below was not what the petitioner believed but what the facts actually were.* It was conceded by the respondent that if obsolescence was to be allowed, the figures used as a basis were proper and that the allowance was properly spread over the obsolescence period.

It is said by the respondent that land is often worth more without the buildings thereon, because other buildings would be prolific of greater income. We subscribe to that. It is for that very reason that obsolescence is allowed.

For the foregoing reasons and those urged in our original brief, we contend that the judgment of the trial court was right and should be affirmed.

Respectfully submitted,

ARTHUR B. HYMAN,
KARL D. LOOS,
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Petitioner.

Washington, D. C.,
January 21, 1931.

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CHARLES ELMORE CROPLEY

No. 352

In the Supreme Court of the United States

OCTOBER TERM, 1930

V. LOEWERS GAMBRINUS BREWERY CO., PETITIONER

v.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 352

V. LOEWERS GAMBRINUS BREWERY CO., PETITIONER

v.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR of Internal Revenue of the United States

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT

The respondent does not oppose the petition, but suggests that the review be limited to the question whether the petitioner is entitled to any deduction for *obsolescence* of its tangible property in the taxable years 1918 and 1919 under Section 234 (a)(7) of the Revenue Act of 1918, which allows as a deduction "A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence." Nowhere in the record does it appear that the petitioner made a claim for the deduction of a loss under Section 234 (a)(4) of the Revenue Act of 1918, its claim having been confined to the

obsolescence deduction. The petitioner's claim for refund filed with the Commissioner of Internal Revenue and its complaint filed in the District Court both alleged error in the disallowance of deductions for obsolescence. (R. 37–39, 18.) The decision of the District Court in favor of the petitioner was based upon the failure to allow the obsolescence deduction (R. 41), and the opinion of the Circuit Court of Appeals is addressed solely to such claimed deduction. (R. 311–312.)

As thus limited, the questions involved are substantially the same as those now before this Court in *Lucas* v. *Niagara Falls Brewing Co.*, No. 61, certiorari granted April 28, 1930. The decision of the Circuit Court of Appeals for the Second Circuit in the *Niagara Falls case* has been overruled by its decision in the instant case, which followed the controlling principle laid down by this Court in *Clarke* v. *Haberle Brewing Co.*, 280 U. S. 384.

The respondent believes that the decision of the Circuit Court of Appeals in the instant case is correct, and, further, that even if obsolescence deductions are allowable for tangible property employed in a business extinguished by prohibition legislation, such a deduction may not be allowed under the facts in this case. But in order to save the petitioner's rights pending the decision of this Court in the *Niagara Falls Brewing Co. case, supra,* and *Lucas* v. *National Industrial Alcohol Co.*, No. 109, certiorari granted June 2, 1930, the respondent sees no reason to oppose the issuance of a writ of

certiorari, provided the review is limited to the question of obsolescence as distinguished from loss deductions.

Respectfully submitted.

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SEPTEMBER, 1930.

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No. 352

In the Supreme Court of the United States

OCTOBER TERM, 1930

V. LOEWERS GAMBRINUS BREWERY COMPANY,
PETITIONER

v.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 352

V. LOEWERS GAMBRINUS BREWERY COMPANY, petitioner

v.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR of Internal Revenue of the United States

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The District Court rendered no opinion but made findings of fact and conclusions of law (R. 22–26), which are not reported.

The opinion of the Circuit Court of Appeals (R. 212) is reported in 42 F. (2d) 216.

JURISDICTION

The judgment of the Circuit Court of Appeals reversing the judgment of the District Court for the Southern District of New York was entered on May 26, 1930. (R. 213.) Petition for a writ of

certiorari was filed August 16, 1930, and granted by this Court on October 20, 1930. (R. 214.)

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Did Congress intend by Section 234 (a) (7) of the Revenue Act of 1918 to authorize a deduction for obsolescence of tangible property caused by the imminence of prohibition legislation?

2. The property which is the subject of the claimed deduction was used after the effective date of prohibition for the manufacture of near beer and other purposes. Since prohibition legislation placed no restriction upon the continued use of the property for these purposes, the question arises whether the deduction may, in any event, be allowed under the facts of this case.

STATUTE INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1077, 1078:

> SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:
>
> * * * * *
>
> (7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence; * * *.

STATEMENT

This case reached the Circuit Court of Appeals on the appeal of the respondent, a Collector of Internal Revenue, from the judgment of the District Court in favor of the petitioner for refund of income and profits taxes for the years 1918 and 1919, in the aggregate amount of $22,091.20, together with interest and costs. (R. 209.) The District Court allowed deductions on account of obsolescence claimed by petitioner but disallowed by the Commissioner.

The District Court held that the petitioner was entitled to a deduction for each of these years, (1) for obsolescence of its brewery buildings and (2) for obsolescence of its good will, and that the deduction on account of each of these items was greater than the income computed without such deduction. (R. 26.) The Circuit Court of Appeals held that the law did not permit a deduction for either and reversed the judgment. (R. 212–213.) The order granting the writ of certiorari provides that "the arguments and briefs * * * be limited to the question whether the petitioner is entitled to any deduction for obsolescence of its tangible property in the taxable years 1918 and 1919 under Sec. 234 (a) (7) of the Revenue Act of 1918." (R. 214.)

Consequently only such of the facts and findings as relate to the deduction for obsolescence of the buildings, are here considered. The case was tried

on written waiver of jury trial by the District Court. Both parties presented requests for findings of fact. Those submitted by the petitioner [plaintiff] were adopted by the court in full. One or two of the findings submitted by the respondent were adopted with some changes. The respondent filed exceptions to most of the findings of fact made by the court and to the refusal of the court to adopt the findings of fact proposed by him. (R. 33–34.) The assignment of errors filed in the District Court raised the question of the sufficiency of the evidence to support the findings objected to. (R. 210, 211.) This matter was not reviewed by the Circuit Court of Appeals. (R. 212.) In view of our contention that, even if the statute does permit a deduction for obsolescence of the tangible property of a brewery caused by prohibition legislation, the facts here do not establish a basis for such a deduction, we discuss certain of the findings and in the argument refer to testimony upon which we rely.

The following matters are not disputed: Petitioner was and is a New York corporation, having its principal place of business in the City of New York. From 1879 until October 29, 1919, it was engaged in the manufacture and sale of lager beer, ale, and porter. On January 31, 1918, it had become a matter of common knowledge and was known to the petitioner that prohibition would take effect; and prohibition became effective on January 16, 1920. The buildings here involved were

constructed especially for the purpose of manufacturing, selling, and delivering beer, ale, and porter; and on January 31, 1918, they had a depreciated cost value of $153,932.18. In October, 1919, the petitioner discontinued the manufacture of intoxicating beverages. (R. 22–25.)

The District Court also made the following finding, suggested by the respondent but modified by the court, the correctness of which we do not dispute (R. 32):

> 22. That subsequent to Prohibition plaintiff to a small extent continued the manufacture of beers, ales and porter having an alcoholic content not in excess of one-half of one per cent and it still continues to manufacture such beverages to a small extent.

The District Court also made the following findings, the italicized portions of which we contend are inconsistent with the finding above quoted or are not supported by the testimony (R. 25):

> 14. That on the 31st day of January, 1918 it had become a matter of common knowledge and was known to the plaintiff that prohibition would become the law of the land and *that as a result of such law persons engaged in the business of manufacturing and selling beers, ales and porter including this plaintiff would suffer obsolescence in the value of their capital assets,* and such

prohibition became effective January 16, 1920.

15. That at January 31, 1918 the depreciated cost of buildings used by the plaintiff in its manufacturing operations as found by the Commissioner of Internal Revenue was the sum of $153,932.18. That *said buildings* were constructed especially for the purposes of manufacturing, selling and delivering beers, ales and porter and *were not commercially adaptable for any other use.*

That at January 16, 1920 such buildings had no salvage value.

15. That as a result of prohibition and beginning January 31, 1918 and ending January 16, 1920, the plaintiff suffered obsolescence of said buildings equal to the total depreciated cost thereof, to wit: $153,932.18 which should be ratably apportioned over such period.

ARGUMENT

We maintain that the Circuit Court of Appeals was correct in holding that Congress did not intend to provide compensation in any form for losses caused by prohibition legislation, and that, consequently, there can be no deduction for obsolescence in the instant case even upon the findings of the District Court. The arguments in support of this position are made on pp. 9–12 of the brief for petitioner in *Burnet, Commissioner,* v. *Niagara Falls*

Brewing Company et al., No. 61, October Term, 1930, to which reference is hereby made. Copies of that brief have been furnished to counsel for petitioner herein.

Even if this contention be overruled, we maintain that the judgment below should be affirmed on the ground that there was in fact no obsolescence of petitioner's property during 1918 or 1919. From its very nature, obsolescence begins only when there is a reasonable certainty that the property will become obsolete. (See pp. 13–14 of brief for the petitioner in *Burnet* v. *Niagara Falls Brewing Co.*, No. 61.)

Whether property is becoming obsolete is a question of fact. The burden was upon the taxpayer to show that it was entitled to the deduction which the Commissioner had disallowed and that the additional tax was to that extent illegally assessed. We challenge the findings of the District Court that on January 31, 1918, it was apparent that the petitioner "would suffer obsolescence in the value of their capital assets," and that the buildings in question were not "commercially adaptable for any other use" than "manufacturing, selling and delivering beers, ales and porter." (R. 25.) If these findings are susceptible of the meaning that on January 31, 1918, it was apparent that the buildings would, upon the advent of prohibition,

have no value, we maintain that they are not supported by the evidence.

No witness testified that before the advent of prohibition it was reasonably apparent that the buildings would have no value. The testimony showed that after the adoption of national prohibition the petitioner manufactured "near beer," using the same plant, or part of the same plant, and that this continued up to the time of the hearing in 1928. (R. 32, 67, 68, 70–71, 75–76, 84, 99, 101.) Although it does appear that the use of the plant for the manufacture of "near beer" has been very much less than it was for the manufacture of intoxicating beverages and that the present business is not nearly as profitable as the former (R. 70–72, 74, 77), it is not shown that this was foreseen during the years in question. Apparently the only reason why more of the buildings are not used in the manufacture of "near beer" is the lack of a sufficiently large volume of business. (R. 110, 115.) Moreover, parts of the buildings have been used for cold storage purposes (R. 74, 132–133) and other parts for the storage of theatrical scenery and electric cars. (R. 73, 100, 101, 131.)

In view of this testimony, we submit the findings are not warranted merely because of the testimony of building experts that the buildings "do not lend themselves economically to other purposes," and

that reconstruction would involve a prohibitive expense. (See R. 126, 134, 142.)

It does not appear that by the end of 1919 the petitioner regarded its buildings as worthless. Thereafter the petitioner received several inquiries and at least one offer for the purchase of the property. (R. 111, 120, 122–123, 125.) Apparently the petitioner continued to insure the buildings up to the time of the trial. (R. 162–166, 209.) There is testimony that the real estate of the petitioner would be more valuable without the buildings than with them, and that the buildings have no "salvage value." (R. 115.) This, we submit, is not equivalent to a finding that the buildings themselves had become valueless because of obsolescence in 1919. It often transpires that land without buildings is more valuable than land with the existing buildings on it, not because the buildings are obsolete, but because the land could be used for the erection of buildings which would produce far more income. There is uncontradicted testimony that the value of the real estate of the petitioner as a whole increased during the years 1918 and 1919. (R. 112.)

The argument of the respondent on this point is similar to that made on pp. 13–18 of the brief for the petitioner in *Burnet* v. *Niagara Falls Brewing Co.*, No. 61.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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JANUARY, 1931.

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Supreme Court of the United States

October Term, 1930.

No. 352

V. LOEWERS GAMBRINUS BREWERY COMPANY,
Petitioner,

vs.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF.

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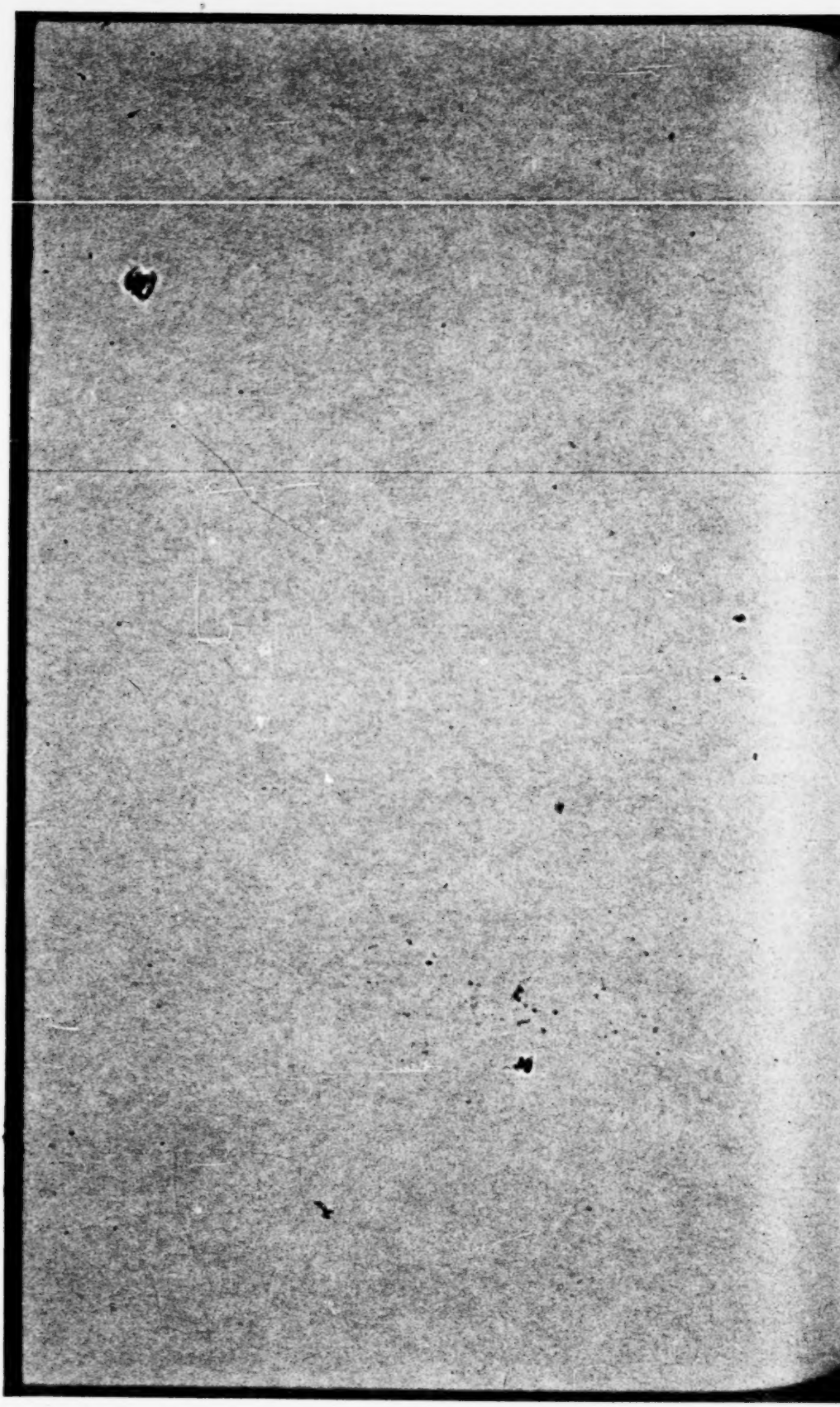

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IN THE

Supreme Court of the United States

October Term, 1930.

No. 352

V. LOEWERS GAMBRINUS BREWERY COMPANY,
Petitioner,

vs.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION

FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

The undersigned respectfully move the Court for leave to file the accompanying brief in this case as *amici curiae*.

This application is made as counsel for the estate of George Ehret, which now has pending before the United States Board of Tax Appeals, with the right of appeal from its decision to the Circuit Court of Appeals for the Second Circuit, a petition in which is presented *inter alia*, the question presented in this

case, namely, whether the late George Ehret was entitled to take any deduction for obsolescence of his tangible property used in the manufacture of beer during the taxable years 1918 and 1919, under Section 234(a) of the Revenue Act of 1918. The estate of the late George Ehret, therefore, has a vital interest in this case.

WHEREFORE, leave to file the accompanying brief is respectfully requested.

FRANK S. BRIGHT,
H. STANLEY HINRICHS,
Amici Curiae.

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V. LOEWERS GAMBRINUS BREWERY COMPANY,
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CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES,
Respondent.

BRIEF

BY FRANK S. BRIGHT AND H. STANLEY HINRICHS, AMICI CURIAE.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petition in this case seeks a review of a decision holding that a brewer, in computing his federal income tax liability under the Revenue Act of 1918, (C. 18, 40 Stat. at Large, 1057) is not entitled to a deduction under Section 234(a)(7) of the said Act on account of the obsolescence of tangible property used in his business.

In this case the Circuit Court of Appeals for the 2nd Circuit rested its decision entirely upon the decision of this Court in the case of *Clarke v. Haberle*

Crystal Springs Brewing Company, 280 U. S., 384, which it construed to mean that a brewer was not entitled to any allowance under said Revenue Act on account of the obsolescence of either tangible or intangible assets due to prohibition legislation.

The same question is also before this Court in *Lucas v. Niagara Falls Brewing Company*, No. 61, this term, on writ of certiorari to the same Court, which prior to the decision of this Court in the said case of *Clarke v. Haberle Crystal Springs Brewing Company* had allowed obsolescence on tangible assets of a brewery under similar circumstances.

ARGUMENT.

Point I. The Court Below Misconstrued the Decision of This Court in the Case of Clarke v. Haberle Crystal Springs Brewing Co.

In the case of *Clarke v. Haberle Crystal Springs Brewing Company, Supra*, this Court held that that particular taxpayer was not entitled to any of the deductions claimed on account of the obsolescence of its good will, stating that:

> "In our opinion the words now used cannot be extended to cover the loss in this case and it is needless to speculate as to what other cases it might include."

In that case, obsolescence of good will only was involved. In this case, the Court below has interpreted the decision of this Court in the said case to mean that no brewer is entitled to any deductions for obsolescence of tangible or intangible property.

Thus, it is stated in the opinion below (Record 212) that

> "In view of the decision of the Supreme Court in *Clarke vs. Haberle Crystal Springs Brewing Co.* ((1929) 280 U. S. 384; 74 L. Ed. 227) a deduction in the value of the building for obsolescence may not be made. We can see no difference between tangible and intangible property within the principle of that case."

The Commissioner of Internal Revenue has also construed the decision of this Court in the case of *Clarke v. Haberle Crystal Springs Brewing Company, supra,* to mean that brewers in computing their Federal Income Tax liability for the years 1918 and 1919, are not entitled to a deduction on account of the obsolescence of tangible property used in the business.

It is respectfully submitted that such a construction of the decision of this Court in the Haberle case is erroneous, because that would inevitably mean that the Federal Income tax liability of brewers under the Revenue Act of 1918 must be based upon their *gross receipts* and not upon their *net income,* for if they are entitled to any deduction whatever from their gross receipts there is as much reason for allowing them the statutory deduction for obsolescence of tangible property used in the business as there is for allowing them the cost of labor, the cost of material, depreciation of equipment, bad debts, etc. And it would necessarily follow that no corporation or individual citizen of the United States would be en-

titled to any of the deductions provided by the statute, because in the statute Congress has not differentiated brewers from any other class of citizens, and this Court, in the case of *Crooks v. Harrelson*, No. 24, this term, has held that the exact wording of a taxing statute must be followed if it is unambiguous. Under that decision (not yet reported) it would seem to be clear that brewers are entitled to every deduction granted by the statute to all taxpayers.

Point II. The Revenue Act of 1918 Contemplates a Deduction on Account of Exhaustion or Obsolescence of Intangible as Well as Tangible Property of All Taxpayers, Including Brewers.

May we, with all due respect, suggest to the Court that if in its decision in the case of *Clarke v. Haberle Crystal Springs Brewing Company, supra*, it was intended to hold that Section 234(a)(7) of the Revenue Act of 1918 provides for an allowance for the exhaustion and obsolescence of only *tangible* property and not for any allowance to cover *intangible* property, the decision is still too broad, because said paragraph provides for

> "A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence"

and *property* used in the business may be intangible as well as tangible. This fact is recognized in the same statute, in its definition of invested capital in Section 325(a) where it is stated

"That as used in this title—

"The term 'intangible property' means patents, copyrights, secret processes, and formulae, good will, trade marks, trade brands, franchises, and other like property.

"The term 'tangible property' means stocks, bonds, notes, and other evidences of indebtedness, bills and accounts receivable, leaseholds, and other property than intangible property."

Section 234 of the Revenue Act of 1918 does not differentiate between "tangible" and "intangible" property and such division is not one which is generally recognized in the law. However, when the terms "tangible" and "intangible" property are used in the statute they are defined. It would therefore seem to be clear that the terms "tangible property" and "intangible property" are, for the purposes of this Revenue Act, statutory terms and each of them is included in the word "property".

It is indisputable that any of the above items classed as "intangible property" may be property of great value in the business of any particular taxpayer, and there is nothing in the statute to differentiate "good will" from "franchises and other like property". Therefore if this court intended in the decision in the case of *Clarke v. Haberle Springs Brewing Company* to deprive a taxpayer of a deduction on account of the obsolescence of good will or other forms of intangible property in a proper case it would seem that the court has gone beyond a fair construction of the statute.

In the said decision this court stated that

> "When a business is extinguished as noxious under the Constitution the owners cannot demand compensation from the Government or a partial compensation in the form of an abatement of taxes otherwise due."

Is it not true none of the provisions of Section 234 of the Revenue Act of 1918 provide for any "compensation" or "abatement of taxes otherwise due", but all of the provisions in Section 234 constitute a part of the directions of the Congress in determining what taxes are due? Surely there is nothing in Section 234 which differentiates any particular provision in said section as "compensation", and with great respect it is submitted that the deduction on account of obsolescence is no more a "contribution" or an "abatement of taxes otherwise due" than the deduction in paragraph (1) of said Section 234, of "all the ordinary and necessary expenses paid * * * in carrying on any trade or business." The point is that the term "net income" is a misnomer unless all the deductions provided for in Section 234 are allowed.

May we also very respectfully suggest that there is nothing in the statute which would authorize a court to deprive a taxpayer of any one of said deductions because the business is noxious or objectionable or even if the business is illegal, and that any such interpretation would render the statute void for ambiguity. If a court had such power, might it not be held that those who were engaged in an illegal

business should be deprived of all of the deductions allowed by the statute? Those engaged in a noxious business should be deprived of some of the deductions granted by the statute to other taxpayers, while those engaged in a business which was merely objectionable should be deprived of only one deduction, dependent upon how objectionable the business might be, while those engaged in a business of unquestionable respectability, and entirely unobjectionable, would be the only ones entitled to all the statutory deductions authorized by Congress in computing the net income of all corporations.

In the case of brewers in particular it would seem that inasmuch as the business was extinguished by an act of Congress for which Congress made no kind of compensation (as Great Britain constantly does in the reduction of the brewery and saloon business) that courts of the United States in the interpretation of the Revenue Acts should not read into that statute an interpretation which would further deprive brewers of the rights to which all other classes of citizens are entitled unless Congress in the taxing statute has clearly expressed a determination to discriminate against them; and if Congress had attempted to do so, would not the statute have been unconstitutional on the ground of its lack of uniformity?

Respectfully submitted.

FRANK S. BRIGHT,

H. STANLEY HINRICHS,

Amici Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 352.—October Term, 1930.

V. Loewers Gambrinus Brewery Company, Petitioner, *vs.* Charles W. Anderson, Individually and as Collector of Internal Revenue of the United States.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 24, 1931.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner sued respondent in the District Court for the Southern District of New York and obtained judgment for $22,091.01 on account of income and profits taxes for 1918 and 1919 erroneously exacted. The Circuit Court of Appeals reversed; and, as the right of petitioner to recover $4,128.85 was not contested, ordered that it have judgment for that amount. 42 F. (2d) 216. This court granted petitioner's application for a writ of certiorari, limited to the question whether petitioner is entitled under § 234 (a) (7) of the Revenue Act of 1918 to any deduction for obsolescence of its tangible property in such years. 282 U. S. —.

Revenue Act of 1918, c. 18, 40 Stat. 1077, 1078, provides:

> Sec. 234. (a) That in computing the net income of a corportation . . . there shall be allowed as deductions . . . (7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence . . .

A jury having been waived in writing, the case was tried by the court without a jury. The court found:

Plaintiff, from 1879 until October 29, 1919, was engaged at New York City in the business of manufacturing and selling beers, ales and porter and for that purpose erected and installed suitable buildings and equipment. January 31, 1918, it had become common knowledge and was known to plaintiff that prohibition would become effective and that as a result plaintiff and others en-

gaged in that business would suffer obsolescence in the value of their capital assets. Prohibition did become effective January 16, 1920. As found by the Commissioner of Internal Revenue, the depreciated cost of plaintiff's buildings as of that date was $153,-932.18. The buildings were constructed especially for the purposes of such manufacture and were not commercially adaptable for any other use. They had no salvage value. As a result of prohibition and beginning January 31, 1918, and ending January 16, 1920, plaintiff suffered obsolescence of such buildings equal to such depreciated cost which should be rateably apportioned over that period. After making provision for allowances for such obsolescence, plaintiff had no net income for 1918 or 1919.

And at defendant's request the court found: With the advent of prohibition it became illegal to manufacture beers, ales and porter having an alcoholic content in excess of one-half of one per cent. Accordingly such manufacture was discontinued by the plaintiff when the prohibitory law became effective. Subsequently plaintiff to a small extent continued the manufacture of beers, ales and porter having an alcoholic content not in excess of one-half of one per cent. and it still continues to manufacture such beverages to a small extent.

The sole question for decision is whether, in calculating its taxes for 1918 and 1919, plaintiff was entitled to any allowance for obsolescence of its buildings resulting from the imminence and taking effect of the prohibitory laws.

The language of § 234 (a) (7) is broad enough to include all obsolescence from whatever cause. But the Government maintains that Congress did not intend to provide compensation in any form for losses caused by prohibition legislation, and that consequently there can be no deduction for obsolescence here even upon the facts found by the District Court. It relies on *Clarke* v. *Haberle Brewing Co.,* 280 U. S. 384 and *Renziehausen* v. *Lucas,* 280 U. S. 387.

The case at bar was decided in the District Court before our decision in the *Haberle* case and on the authority of that decision the Circuit Court of Appeals held plaintiff not entitled to any allowance for obsolescence of its buildings. But the sole question presented to us in that case was whether a brewing company making its tax return for 1919 under the Act now before us and

whose business would be destroyed by the taking effect of prohibition was entitled to deduct anything on account of exhaustion or obsolescence of its good will. The court said (p. 386): "We shall not follow counsel into the succession of regulations or the variations in the law before the date of the Act that we have to construe. In our opinion the words now used cannot be extended to cover the loss in this case and it is needless to speculate as to what other cases it might include." When regard is had to the issue between the parties and the point decided, it is clear that there is nothing in our construction of the statute or in the reasons adduced to support the conclusion reached, that is decisive of the question now under consideration, or that suggests that, in respect of allowances for obsolescence of tangible property, the statute does not apply to brewers and their buildings just as it does to others and their tangible property. Indeed the language used definitely limits the opinion to obsolescence of good will.

In *Renziehausen* v. *Lucas* the taxpayer was a distiller. His claim for obsolescence of good will, under § 214 (a) (8) applicable to individuals and in the same words as § 234 (a) (7), was denied on the authority of the *Haberle* case. He also claimed allowances for obsolescence resulting from prohibition to his plant, equipment and bonded warehouses. That claim was denied by the Commissioner but it was allowed by the Board of Tax Appeals, 8 B. T. A. 87, and that decision was affirmed in the Circuit Court of Appeals. 31 F. (2d) 675. The taxpayer insisted here that the allowance for obsolescence of his warehouses was inadequate. The Government opposed the increase but did not challenge either the propriety of an allowance or the amount fixed below. Dealing with the case on the assumption that the statute applied to obsolescence due to prohibition just as it does to that resulting from other causes, we held that the taxpayer had "no reason to complain of the allowance for obsolescence of the warehouses". That case makes against rather than for the Government's present contention.

The tangible property by which a business is carried on is plainly distinguishable from the element of good will inhering therein. The cost of plant depreciation, *i. e.*, exhaustion, wear, tear and obsolescence, is a part of operating expenses necessary to carry on a manufacturing business. The gain or loss in any year can-

not be rightly ascertained without taking into account the amount of such cost that is justly attributable to that period of time.

The history of § 234 (a) (7) discloses a legislative purpose that the amount reasonably attributable to each year on account of obsolescence of tangible property used in the taxpayer's business is to be taken into account in ascertaining his taxable income. The excise tax act of 1909 permitted the deduction of "a reasonable allowance for depreciation of property, if any."[1] Regulations of the Treasury Department construed the provision to mean the loss in value "that arises from exhaustion, wear and tear, or obsolescence out of the uses to which the property is put."[2] The Revenue Act of 1913 provided for a "reasonable allowance for depreciation by use, wear and tear of property if any".[3] The Regulations provided for a deduction for depreciation in the value of the property "that arises from exhaustion, wear and tear, or obsolescence out of the uses to which the property is put".[4] The Revenue Act of 1916 dropped the word depreciation and permitted "a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade".[5] Under that provision no deduction on account of obsolescence was allowed except for the "withdrawal from use of the obsolete property".[6] The House draft of the Act of 1918 provided for an allowance for exhaustion, wear and tear. It did not expressly refer to depreciation or obsolescence. The Senate amended by substituting "depreciation" for "exhaustion, wear and tear". In conference that word was taken out and the provision was made to read as it now stands, "a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence".

None of the Acts made any classification based on the causes from which obsolescence results. And, as the sole purpose is to arrive at the net income subject to taxation, it is clear that such a discrimination could not reasonably or justly be made. Section

[1]Section 38, 36 Stat. 112.
[2]Regulations 31, Art. 4.
[3]Section II G (b), 38 Stat. 172.
[4]Regulations 33, Art. 129.
[5]Section 12 (a), 39 Stat. 767.
[6]Regulations 33 Revised, Art. 178.

234 (a) (7) and other provisions of the same substance have been generally, if not uniformly, held to apply to obsolescence of tangible property, whatever its cause, where the amount fairly attributable to the tax year has been shown.[7] There is nothing in the language of the statute or the circumstances of its enactment to suggest that Congress intended that the taxable incomes of brewers should not be arrived at according to the rules that govern taxable incomes of others.

The Government also insists that in any event there was no obsolescence in plaintiff's buildings in 1918 or 1919 because, from its very nature, obsolesence begins only when there is a reasonable certainty that the property will become obsolete.

The statute contemplates annual allowance for obsolescence just as it does for exhaustion, wear and tear. That is necessary in order to determine true gain or loss because postponement of deductions to cover obsolescence until the property involved became obsolete would distort annual income. It is well understood that exhaustion, wear, tear or obsolescence cannot be accurately measured as it progresses and undoubtedly it was for that reason that the statute authorized "reasonable" allowances to cover them in order equably to spread that element of operating expenses through the years. The findings of fact show that the imminence of prohibition became known in January of 1918 and that it took effect in January of 1920. The court found that, although they were subsequently used to a small extent in the manufacture of non-intoxicating beverages, plaintiff's buildings had no salvage value when prohibition took effect. Undoubtedly it was obvious from the beginning of that period that buildings not commercially adaptable

[7]Dean *v.* Hoffheimer Bros. Co., 29 F. (2d) 668; Kansas City Title & Trust Co. *v.* Crooks, 35 F. (2d) 351; National Ind. Alcohol Co. *v.* Commissioner, 38 F. (2d) 718; Michigan Lithographing Co., 1 B. T. A. 989; Robert H. McCormick, 2 B. T. A. 430; Dilling Cotton Mills, 2 B. T. A. 127; Annie L. Dean, 3 B. T. A. 896; Northern Hotel Co., 3 B. T. A. 1099; American Valve Co., 4 B. T. A. 1204; Auditorium Co., 5 B. T. A. 163; Northeastern Oil & Gas Co., 5 B. T. A. 332, 337; Corsicana Gas & Elec. Co., 6 B. T. A. 565; Balaban & Katz Corporation, 6 B. T. A. 610; Manhattan Brewing Co., 6 B. T. A. 952; Mary M. Dowling, 6 B. T. A. 976, 979; Star Brewing Co., 7 B. T. A. 377; National Industrial Alcohol Co., 7 B. T. A. 1241; Konrad Schreier Co., 9 B. T. A. 407; George Wiedemann Brewing Co., 9 B. T. A. 792; J. Chr. G. Hupfel Co., 9 B. T. A. 944; Milwaukee-Waukesha Brewing Co., 15 B. T. A. 579.

to any use other than brewing intoxicating liquor would suffer obsolescence because of the destruction of that business.

Under the order granting the writ there is before us no question as to the propriety of the amount of the allowance or its allocation between the tax years in question.

Judgment of the Circuit Court of Appeals reversed.

Judgment of the District Court affirmed.

Mr. Justice STONE concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.